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## ***The Evolution of WTO And Vis A Vis Intellectual Property Right Protection: A Deliberation on Afghanistan Legal System***

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*. The WTO is the most important international organization that governs world trade. Decisions are made by the member countries. The WTO has 164 members and 24 observer governments (most of which have applied for membership), and members represent over 98% of world trade. The highest-level decisions are made at the Ministerial Conference, which is the meeting of trade ministers from member countries. Since Afghanistan is one of the LDCs currently, the accession to WTO gives responsibilities and commitment to abide by the terms and conditions such as domestic reforms for transformation to a productive market economy, attracting investments and creating jobs and improving the welfare of Afghans. For the development of the economy, compliance with WTO is to be adhered to by Afghanistan which obliges the country to make trade policies transparent by notifying the WTO about laws in force and measures adopted. Since Afghanistan has gained accession to WTO and TRIPS agreement has had an impact on the copyrights, trademark, patent, Industrial design, utility model, integrated circuits, and geographical indication. However, the scheme of the present study is confined to assessing the impact of the WTO agreement and TRIPS agreement in Afghanistan.*

***Keywords: IPR in Afghanistan, WTO regime, WTO, International Trade in Afghanistan***

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## 1.0 BACKGROUND OF WTO

The World Trade Organization (WTO) was established on January 1, 1995, under an agreement reached during the Uruguay Round of multilateral trade negotiations. The Uruguay Round was the last of a series of periodic trade negotiations held under the auspices of the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT). Assisting the members is a WTO Secretariat that numbers about 635 and is located in Geneva, Switzerland. The top official of the Secretariat is Director-General Pascal Lamy of France, whose three-year term began on September 1, 2005<sup>2</sup>. The Ministerial Conference must meet at least every two years. The General Council is the body of national representatives that oversees the day-to-day operations of the WTO.<sup>3</sup> The General Council meets approximately monthly. It also meets in two other capacities: it reviews national trade policies, and it oversees the dispute settlement process. Under the General Council are numerous committees, working groups, and other bodies<sup>4</sup>.

Trade agreements administered by the WTO cover a broad range of goods and services trade and apply to virtually all government practices that directly relate to trade, for example tariffs, subsidies, government procurement, and trade-related intellectual property rights<sup>5</sup>. The WTO agreements are based on the principle of non-discriminatory treatment among countries. Some exceptions however, such as preferential treatment for developing countries, are allowed. Other basic principles of the WTO are open information on rules and regulations<sup>6</sup>, negotiated limits on trade barriers, and settlement of disputes under specific procedures.<sup>7</sup>

The 110th Congress may examine the relationship between the United States and the WTO in two ways. Congress may consider implementing legislation for a potential Doha Round agreement. U.S. Trade Promotion Authority (TPA) expired on July 1, 2007, however, Congress

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<sup>2</sup> "WTO | Understanding the WTO - the Secretariat". [www.wto.org](http://www.wto.org). Retrieved 22 February 2022.

<sup>3</sup> Sayed Qudrat Hashimy & Jackson Simango Magoge, *Role of WTO in the Promotion of Trade and IPR in Afghanistan*, 7 J. ECON. FINANCE DRJ-JEF 1 (2022).

<sup>4</sup> "WTO | Understanding the WTO - Whose WTO is it anyway?". [www.wto.org](http://www.wto.org). Retrieved 18 February 2022.

<sup>5</sup> Goldstein, Judith L.; Rivers, Douglas; Tomz, Michael (2007). "Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade". *International Organization*. 61 (1): 37–67. doi:10.1017/S0020818307070014. ISSN 1531-5088.

<sup>6</sup> Tomz, Michael; Goldstein, Judith L; Rivers, Douglas (2007). "Do We Really Know That the WTO Increases Trade? Comment". *American Economic Review*. 97 (5): 2005–2018. doi:10.1257/aer.97.5.2005. ISSN 0002-8282

<sup>7</sup> Hashimy and Magoge, *supra* note 3 at 5.

may extend or reauthorize TPA to consider such an agreement. Secondly, Congress may consider changes to U.S. laws in response to WTO dispute settlement procedures.

The intent of these negotiators was to establish an International Trade Organization (ITO), which would address not only trade barriers but other issues indirectly related to trade, including employment, investment, restrictive business practices, and commodity agreements. The ITO was to be a United Nations specialized agency, but the ITO treaty was not approved by the United States and a few other signatories and never went into effect. Instead, a provisional agreement on tariffs and trade rules, called the General Agreement on Tariffs and Trade (GATT) was reached and went into effect in 1948. This provisional GATT became the principal set of rules governing international trade for the next 47 years.

The GATT established trade principles that continue to be applied today. Among the most important of these principles was non-discrimination with regard to the treatment of trade in goods among countries. The most-favored-nation principle, Article I of the GATT, states that any advantage given by a contracting party to a product of another country must be extended unconditionally to a like product of all other contracting parties<sup>8</sup>. A second rule of non-discrimination is national treatment, the principle that imported and domestic goods should be treated equally. Although non-discrimination is a cornerstone of the GATT, some exceptions are allowed. For example, customs unions, free-trade areas, and special treatment for developing countries are permitted.

Another principle is the open and fair application of any trade barriers. Tariffs were the most common and visible form of trade barrier at the time the GATT was established. Tariffs are "bound," or set at maximum levels, and not to increase above the negotiated level<sup>9</sup>. In general, quantitative restrictions such as quotas were not allowed, since tariffs were much easier to identify and to eventually reduce.

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<sup>8</sup> Silva, Peri Agostinho; Nicita, Alessandro; Olarreaga, Marcelo (2018). "Cooperation in WTO's Tariff Waters?" (PDF). *Journal of Political Economy*. **126** (3): 1302–1338. doi:10.1086/697085. ISSN 0022-3808. S2CID 152401600

<sup>9</sup> Allee, Todd; Elsig, Manfred; Lugg, Andrew (2017). "The Ties between the World Trade Organization and Preferential Trade Agreements: A Textual Analysis". *Journal of International Economic Law*. **20** (2): 333–363. doi:10.1093/jiel/jgx009. ISSN 1369-3034

The GATT also included a forum and process for countries to follow in trying to resolve disputes. The dispute process allowed countries to consult with each other and if that was not successful, a country could ask that a panel hear the complaint. Although the panel's decision was not enforceable, the panel report carried some force of opinion and encouraged countries to work toward an agreeable resolution.

One of the GATT's chief purposes was the reduction of barriers to trade. With this goal in mind, GATT contracting parties met periodically to negotiate further reduction of tariffs and other trade barriers and changes to GATT rules. These negotiations were called "rounds." Early rounds dealt only with tariff reductions, but later rounds also included nontariff barriers to trade. The most recent round, the Uruguay Round, lasted from 1986 to 1994 and included the most encompassing set of negotiations in the history of the GATT<sup>10</sup>. On the agenda was reform of the existing GATT system, as well as expansion of rules to cover new areas such as services trade and the trade aspects of intellectual property rights (copyrights, trademarks, and patents). The agreements that resulted from the Uruguay Round also contained a built-in agenda requiring that further negotiations on agriculture, services, intellectual property rights, and government procurement begin by the year 2000.

One of the most important changes that came about from the Uruguay Round was the establishment of a new trade structure, the World Trade Organization (WTO), which incorporated the many changes reached during the Uruguay Round: the former GATT with its newly negotiated reforms, bodies to oversee the new trade agreements, a stronger dispute resolution procedure, a regular review of members' trade policies, and many other committees and councils. In contrast to the GATT, the WTO was created as a permanent structure, with "members" instead of "contracting parties." The WTO went into effect on January 1, 1995.<sup>11</sup>

## 2.0 THE WORLD TRADE ORGANIZATION

There are 164 members of the WTO, representing over 95% of world trade, 24 observer governments (most of which have applied for membership in the WTO), and seven international

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<sup>10</sup> Fergusson, Ian F. (2007). "The World Trade Organization: Background and Issues" (PDF). Congressional Research Service. p. 4. Archived (PDF) from the original on 27 February 2022

<sup>11</sup> Sayed Qudrat Hashimy & C. Basavaraju, *Impact of WTO Agreement Accession on Trade and A Few Intellectual Property Rights in Afghanistan*, SOC. SCI. RES. NETW. 1, 7 (2021).

organization observers. The WTO is located in Geneva, Switzerland. The WTO Secretariat assists member countries and numbered 625 in 2007.<sup>12</sup> The WTO budget for the year 2007 is 182.0 million Swiss Francs (CHF), or about \$151.7 million (1.20 CHF = \$1, average for 2007)<sup>13</sup>. Countries contribute according to their share of world trade, based on trade in goods, services and intellectual property rights.<sup>14</sup>

Countries contribute according to their share of world trade, based on trade in goods, services and intellectual property rights. The Ministerial Conference examines current programs and sets the agenda for future work. It must meet at least every two years. The WTO's Director-General is Pascal Lamy of France, whose three-year term began on September 1, 2005.<sup>15</sup>

The *first* meeting of the Ministerial Conference was held in Singapore on December 9-13, 1996. At that meeting, trade ministers reviewed the work of the WTO, since its establishment and agreed on a work schedule for the next few years. They also approved an action plan for least-developed countries, and many members entered into an agreement to eliminate tariffs on information technology products by the year 2000<sup>16</sup>. The *second* meeting of the Ministerial Conference was held in Geneva on May 18 and 20, 1998. Again, it reviewed the work of the WTO and approved a future work program. It called for an examination of issues related to global electronic commerce and started preparations for the next meeting<sup>17</sup>.

The *third* Ministerial Conference was held in Seattle on November 29-December 3, 1999. That meeting was intended to review an agenda for a new round of trade negotiations, but trade ministers could not reach agreement and suspended their work. The WTO Director-General was directed to consult with delegations and discuss ways in which countries might bridge remaining

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<sup>12</sup> *Id.* at 14.

<sup>13</sup> The total WTO budget includes CHF176.9 million CHF for the WTO Secretariat and CHF 5.1 million for the Appellate Body and its Secretariat. See WTO Annual Report 2007, p. 112.

<sup>14</sup> In FY2007, the U.S. share was 14.9% of total contributions to the WTO budget, which came to CHF 26.8 million (\$22.3 million) in 2007. *Ibid.*, p. 118.

<sup>15</sup> The institution of the WTO is examined in a 2004 report by leading experts to Director-General Supachai Panitchpakdi. See, Consultative Board, Peter Sutherland (Chair). *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*. World Trade Organization, 2004, 86 p. Available at the WTO website <http://www.wto.org>, Accessed on 24<sup>th</sup> February 2022.

<sup>16</sup> The first meeting of the Ministerial Conference, Available at [https://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/min96\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min96_e/min96_e.htm), Accessed on 4<sup>th</sup> April 2022.

<sup>17</sup> The second meeting of the Ministerial Conference, Available at [https://www.wto.org/english/thewto\\_e/minist\\_e/min98\\_e/min98\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min98_e/min98_e.htm), Accessed on 4<sup>th</sup> April 2022.

differences. Known as the "Battle at Seattle," the Ministerial was characterized by street violence and anti-globalization protesters<sup>18</sup>.

The *fourth* Ministerial Conference was held in Doha, Qatar on November 9-14, 2001. At that meeting, trade ministers agreed to launch a new round of multilateral trade negotiations, called the Doha Development Agenda<sup>19</sup>, and set a deadline for final agreements of January 1, 2005. They established a work program for the new round and agreed to consider numerous developing-country issues.<sup>20</sup>

The *fifth* Ministerial Conference was held September 10-14, 2003, in Cancun, Mexico. According to the Ministerial Declaration released two years earlier in Doha, Qatar, the fifth Ministerial Conference was intended to "...take stock of progress in the negotiations, provide any necessary political guidance, and take decisions as necessary." Many trade ministers at the Cancun Ministerial attempted to reach a framework to guide the remaining negotiations of the new round, but they could not resolve major differences, and the negotiations stalled<sup>21</sup>.

The *sixth* Ministerial Conference was held in Hong Kong on December 13-18, 2005. Although an original goal of the Ministerial was to agree on a package of modalities for the ongoing Doha Development Agenda (DDA) round of trade negotiations, this aim was dropped and members agreed to some modest advancements in agriculture, industrial tariffs, and duty and quota-free access for least developed countries<sup>22</sup>.

The WTO General Council, on 26 May 2009, agreed to hold a seventh WTO ministerial conference session in Geneva from 30 November–3 December 2009.<sup>23</sup> A statement by chairman

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<sup>18</sup> The third Ministerial Conference was held in Seattle, Available at <https://www.sesric.org/files/article/185.pdf>

<sup>19</sup> Results of the Doha Ministerial Conference, see CRS Report RL31206, The WTO Doha Ministerial: Results and Agenda for a New Round of Negotiations

<sup>20</sup>The fourth Ministerial Conference, Available at

[https://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/brief\\_e/brief02\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief02_e.htm), Accessed on 4<sup>th</sup> April 2022.

<sup>21</sup> The fifth Ministerial Conference, Available at

[https://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_e.htm#:~:text=The%20Fifth%20WTO%20Ministerial%20Conference%20was%20held%20in%20Canc%C3%BAn%2C%20Mexico,under%20the%20Doha%20Development%20Agenda](https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm#:~:text=The%20Fifth%20WTO%20Ministerial%20Conference%20was%20held%20in%20Canc%C3%BAn%2C%20Mexico,under%20the%20Doha%20Development%20Agenda), Accessed on 4<sup>th</sup> April 2022.

<sup>22</sup> The sixth Ministerial Conference, Available at

[https://www.wto.org/english/thewto\\_e/minist\\_e/min05\\_e/min05\\_e.htm#:~:text=The%20Sixth%20WTO%20Ministerial%20Conference%20was%20held%20in%20Hong%20Kong,political%20direction%20for%20the%20organization](https://www.wto.org/english/thewto_e/minist_e/min05_e/min05_e.htm#:~:text=The%20Sixth%20WTO%20Ministerial%20Conference%20was%20held%20in%20Hong%20Kong,political%20direction%20for%20the%20organization), Accessed on 4<sup>th</sup> April 2022.

<sup>23</sup> Hashimy and Basavaraju, *supra* note 11 at 87.

Amb. Mario Matus acknowledged that the prime purpose was to remedy a breach of protocol requiring two-yearly "regular" meetings, which had lapsed with the Doha Round failure in 2005, and that the "scaled-down" meeting would not be a negotiating session, but "emphasis will be on transparency and open discussion rather than on small group processes and informal negotiating structures". The general theme for discussion was "The WTO, the Multilateral Trading System and the Current Global Economic Environment"<sup>24</sup>

The body that oversees the day-to-day operations of the WTO is the General Council<sup>25</sup>, which consists of a representative from each member country. The Council generally meets monthly and provides a forum for countries to discuss a range of trade matters. The U.S. delegate to the General Council is the Deputy U.S. Trade Representative in Geneva.<sup>26</sup>

The General Council also meets in two other, unique capacities. One is the Trade Policy Review Mechanism (TPRM). The TPRM was established under the Uruguay Round agreements to allow closer monitoring of national trade policies of member countries<sup>27</sup>. The four countries with the largest shares of world trade are reviewed every two years, the next 16 largest traders are reviewed every four years, and other countries are reviewed every six years, although least-developed countries might be reviewed less frequently. The trade reviews provide information on a country's trade policies and comment on whether a country is pursuing market-opening or market-restrictive policies. This public examination is a mild form of pressure for a country to avoid practices that discourage trade.

The General Council also meets in the capacity of the Dispute Settlement Body (DSB). The Uruguay Round agreements greatly strengthened the process for settlement of disputes<sup>28</sup>. The first stage of the process is consultation between the governments involved. If consultation is not

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<sup>24</sup>WTO to hold 7th Ministerial Conference on 30 November–2 December 2009 WTO official website, Available at [https://www.wto.org/english/news\\_e/news09\\_e/gc\\_chair\\_stat\\_26may09\\_e.htm](https://www.wto.org/english/news_e/news09_e/gc_chair_stat_26may09_e.htm), Accessed on 5<sup>th</sup> April 2022.

<sup>25</sup> The WTO General Council, Available at [https://www.wto.org/english/thewto\\_e/gcounc\\_e/gcounc\\_e.htm](https://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm)

<sup>26</sup> Hashimy and Magoge, *supra* note 3 at 11.

<sup>27</sup> Trade Policy Review Mechanism as amended by the General Council (Revision, effective as of Jan 1, 2019), Available at [https://www.wto.org/english/docs\\_e/legal\\_e/29-tprm\\_e.htm](https://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm), Accessed on 6<sup>th</sup> April 2022.

<sup>28</sup> Uruguay Round Agreement Article 3.2 The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

successful, the complainant may ask the DSB to establish a dispute panel. The dispute panel hears the case and reports back to the DSB. If the complaint is upheld, the respondent must either change its practice or negotiate an agreeable resolution. Otherwise, the complainant may request that the DSB authorize suspension of obligations, thereby giving permission for the complainant to retaliate. For example, a complainant may receive permission to increase tariffs against a respondent country that disregards a decision by the DSB. Permission is automatic unless unanimously disapproved. Procedures are clearly set out with specific timetables at each stage.<sup>29</sup>

More specialized work is done in three major bodies under the General Council. One of these is the Council for Trade in Goods<sup>30</sup>, under which committees work on a number of trade areas. One committee works on trade in agriculture. Another committee oversees the related topic of sanitary and phytosanitary measures, which are measures that pertain respectively to animal and plant health and safety. Some committees monitor practices that are considered "unfair" if not implemented in accordance with WTO rules (antidumping<sup>31</sup>, subsidies and countervailing measures<sup>32</sup>). Other committees examine practices that are not necessarily "unfair" but could be trade-distorting nonetheless (rules of origin, safeguards, technical barriers, customs valuation, and import licensing). One committee works on the relatively new area of trade-related investment measures, and another addresses market access issues (tariffs and nontariff measures). Also under the Council for Trade in Goods is the Information Technology Agreement Committee.

A second major body under the General Council is the **Council for Trade in Services**<sup>33</sup>, which oversees the Uruguay Round agreement on trade in services. The Uruguay Round services agreement has three parts. The first part lists basic principles that countries agree to observe, including national treatment, most-favored-nation treatment, and transparency (open information

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<sup>29</sup>For information on the WTO dispute process, see CRS Report RS20088, Dispute Settlement in the World Trade Organization: An Overview

<sup>30</sup> GATT and the Goods Council, Available at [https://www.wto.org/english/tratop\\_e/gatt\\_e/gatt\\_e.htm](https://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm)

**1.0** <sup>31</sup> AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994, AVAILABLE AT [https://www.wto.org/english/docs\\_e/legal\\_e/19-adp\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm), ACCESSED ON 10<sup>TH</sup> APRIL 2022.

**2.0** <sup>32</sup> AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES ("SCM AGREEMENT"), AVAILABLE AT [https://www.wto.org/english/tratop\\_e/scm\\_e/subs\\_e.htm](https://www.wto.org/english/tratop_e/scm_e/subs_e.htm), ACCESSED ON 10<sup>TH</sup> APRIL 2022.

**3.0** <sup>33</sup> THE SERVICES COUNCIL, ITS COMMITTEES AND OTHER SUBSIDIARY BODIES, AVAILABLE AT [https://www.wto.org/english/tratop\\_e/serv\\_e/s\\_coun\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm), ACCESSED ON 5<sup>TH</sup> APRIL 2022.

about relevant laws and regulations). The second part contains four annexes with rules on: (1) the movement of persons who provide services, (2) financial services, (3) telecommunications, and (4) air transport services. The third part is a schedule of country commitments. These commitments are bound and cannot be reduced in scope, much like the tariff levels on goods, which cannot be increased once they are bound. The service commitments may include exceptions to the national treatment and most-favored-nation principles, if countries included these exceptions when they originally negotiated the commitments.

## **2.1 THE COUNCIL FOR TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS (TRIPS)<sup>34</sup>**

is the third major body under the General Council. The TRIPS Council monitors the agreement on intellectual property rights reached during the Uruguay Round and supervises members' compliance. The TRIPS agreement has three parts. The first part outlines basic principles that countries must observe, including national treatment and most-favored-nation treatment. The second part establishes standards for the different types of intellectual property rights such as patents, trademarks, copyrights, industrial designs, and geographical indications (e.g., "champagne" indicates a wine from a specific region), and ensures minimum lengths of time for protections. The third part of the agreement establishes enforcement processes.

In addition to the bodies discussed above, there are many other committees and working groups under the General Council. For example, there are working groups on trade, debt, and finance and on trade and transfer of technology. There are committees on plurilateral agreements, which are not signed by all WTO members, on civil aircraft and on government procurement<sup>35</sup>. The Committee on Trade and Development often works with other international institutions on special concerns of countries in development. Working parties on accession meet with applicant countries to identify changes that are necessary to bring the applicant's trade regime into line with WTO rules and principles.<sup>36</sup> The Uruguay Round also established a committee on trade and environment.

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<sup>34</sup> Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS), Available at [https://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/trips_e.htm), Accessed on 5<sup>th</sup> April 2022.

<sup>35</sup> WTO Agreement on Government Procurement, Available at [https://www.wto.org/english/tratop\\_e/gproc\\_e/gp\\_gpa\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm), Accessed on 5<sup>th</sup> April 2022.

<sup>36</sup> TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)

## 2.2 GATT ROUNDS OF NEGOTIATIONS

The GATT was the only multilateral instrument governing international trade from 1946 until the WTO was established on 1 January 1995<sup>37</sup>. Despite attempts in the mid-1950s and 1960s to create some form of institutional mechanism for international trade, the GATT continued to operate for almost half a century as a semi-institutionalized multilateral treaty regime on a provisional basis<sup>38</sup>.

## 2.3 FROM GENEVA TO TOKYO

Seven rounds of negotiations occurred under GATT. The first real GATT trade rounds concentrated on further reducing tariffs. Then, the Kennedy Round in the mid-sixties brought about a GATT anti-dumping Agreement and a section on development. The Tokyo Round during the seventies was the first major attempt to tackle trade barriers that do not take the form of tariffs, and to improve the system, adopting a series of agreements on non-tariff barriers, which in some cases interpreted existing GATT rules, and in others broke entirely new ground. Because these plurilateral agreements were not accepted by the full GATT membership, they were often informally called "codes." Several of these codes were amended in the Uruguay Round and turned into multilateral commitments accepted by all the WTO members. Only four remained plurilateral (those on government procurement, bovine meat, civil aircraft, and dairy products), but in 1997 WTO members agreed to terminate the bovine meat and dairy agreements, leaving only two<sup>39</sup>.

## 2.4 URUGUAY ROUND

Well before GATT's 40th anniversary, its members concluded that the GATT system was straining to adapt to a new globalizing world economy<sup>40,41</sup>. In response to the problems identified in the 1982 Ministerial Declaration (structural deficiencies, spill-over impacts of certain

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<sup>37</sup>The GATT Years: from Havana to Marrakesh, WTO official site, Available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm), Accessed on 5<sup>th</sup> April 2022.

<sup>38</sup>M. E. Analysis of the World Trade Organization, 17,

<sup>39</sup> Supra Note 6

<sup>40</sup>P. Gallagher, The First Ten Years of the WTO, 4, Available at <https://www.angusrobertson.com.au/books/the-first-ten-years-of-the-wto-peter-gallagher/p/9780521862158>, Accessed on 5<sup>th</sup> April 2022.

<sup>41</sup>The Uruguay Round, WTO official site, Available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact5\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm), Accessed on 5<sup>th</sup> April 2022.

countries' policies on world trade GATT could not manage, etc.), the eighth GATT round – known as the Uruguay Round – was launched in September 1986, in Punta del Este, Uruguay<sup>42</sup>.

It was the biggest negotiating mandate on trade ever agreed: the talks were going to extend the trading system into several new areas, notably trade in services and intellectual property, and reforming trade in the sensitive sectors of agriculture and textiles; all the original GATT articles were up for review<sup>43</sup>. The Final Act concluding the Uruguay Round and officially establishing the WTO regime was signed 15 April 1994, during the ministerial meeting at Marrakesh, Morocco, and hence is known as the Marrakesh Agreement<sup>44</sup>.

The GATT still exists as the WTO's umbrella treaty for trade in goods, updated as a result of the Uruguay Round negotiations<sup>45</sup> (a distinction is made between *GATT 1994*, the updated parts of GATT, and *GATT 1947*, the original agreement which is still the heart of GATT 1994)<sup>46,47</sup>. GATT 1994 is not, however, the only legally binding agreement included via the Final Act at Marrakesh; a long list of about 60 agreements, annexes, decisions, and understandings was adopted. The agreements fall into a structure with six main parts:

- *The Agreement Establishing the WTO*
- *Goods and investment – the Multilateral Agreements on Trade in Goods including the GATT 1994 and the Trade Related Investment Measures (TRIMS)*<sup>48</sup>
- *Services – the General Agreement on Trade in Services (GATS)*<sup>49</sup>
- *Intellectual property – the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*

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<sup>42</sup> Supra Note 9

<sup>43</sup> Supra Note 10

<sup>44</sup>"Legal texts – Marrakesh agreement". WTO. Retrieved 30 May 2022, Available at [https://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm), Accessed on 5<sup>th</sup> April 2022.

<sup>45</sup> Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994)

<sup>46</sup> GATT 1994:General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994)

<sup>47</sup> CALDAS, Ricardo. Brazil in the Uruguay Round of the GATT: The Evolution of Brazil's Position in the Uruguay Round, with Emphasis on the Issue of Services.

<sup>48</sup> TRIMS Agreement: Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186

<sup>49</sup> GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

- *Dispute settlement (DSU)*<sup>50</sup>
- *Reviews of governments' trade policies (TPRM)*<sup>51</sup>

In terms of the WTO's principle relating to tariff "ceiling-binding" (No. 3), the Uruguay Round has been successful in increasing binding commitments by both developed and developing countries, as may be seen in the percentages of tariffs bound before and after the 1986–1994 talks<sup>52</sup>.

## 2.5 DOHA ROUND (DOHA AGENDA)

The WTO launched the current round of negotiations, the Doha Development Round, at the fourth ministerial conference in Doha, Qatar in November 2001.<sup>53</sup> This was an ambitious effort to make globalization more inclusive and help the world's poor, particularly by slashing barriers and subsidies in farming<sup>54</sup>. The initial agenda comprised both further trade liberalization and new rule-making, underpinned by commitments to strengthen substantial assistance to developing countries<sup>55</sup>.

The negotiations have been highly contentious. Disagreements continue over several key areas including agriculture subsidies, which emerged as critical in July 2006<sup>56</sup>. According to a European Union statement, "The 2008 Ministerial meeting broke down over a disagreement between exporters of agricultural bulk commodities and countries with large numbers of subsistence farmers on the precise terms of a 'special safeguard measure' to protect farmers from surges in imports.<sup>57</sup>" The position of the European Commission is that "The successful conclusion of the Doha negotiations would confirm the central role of multilateral liberalisation

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<sup>50</sup>Erskine, Daniel (January 2004). ""Resolving Trade Disputes, the Mechanisms of GATT/WTO Dispute Resolution" by Daniel H. Erskine". Santa Clara Journal of International Law. 2 (1): 40.

<sup>51</sup>Overview: a Navigational Guide, WTO official site. For the complete list of "The Uruguay Round Agreements," see WTO legal texts, WTO official site, and Uruguay Round Agreements, Understandings, Decisions, and Declarations, WorldTradeLaw.net

<sup>52</sup>Principles of the Trading System, WTO official site, Available at [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm#seobox](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#seobox), Accessed on 12<sup>th</sup> April 2022.

<sup>53</sup> Hashimy and Magoge, *supra* note 3 at 6.

<sup>54</sup>"In the twilight of Doha". The Economist. The Economist: 65. 27 July 2006, Available at <https://www.economist.com/special-report/2006/07/27/in-the-twilight-of-doha>

<sup>55</sup>European Commission The Doha Round, Available at [https://ec.europa.eu/trade/policy/eu-and-wto/doha-development-agenda/index\\_en.htm](https://ec.europa.eu/trade/policy/eu-and-wto/doha-development-agenda/index_en.htm)

<sup>56</sup>Fergusson, Ian F. (18 January 2008). "World Trade Organization Negotiations: The Doha Development Agenda" (PDF). Congressional Research Service. Retrieved 13 April 2022. p.8 9 (folio CRS-6)

<sup>57</sup>WTO trade negotiations: Doha Development Agenda Europa press release, 30May 2022, Available at [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_11\\_751](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_751)

and rule-making. It would confirm the WTO as a powerful shield against protectionist backsliding.<sup>58"</sup> An impasse remains and, as of August 2013, agreement has not been reached, despite intense negotiations at several ministerial conferences and at other sessions. On 27 March 2013, the chairman of agriculture talks announced "a proposal to loosen price support disciplines for developing countries' public stocks and domestic food aid." He added: "...we are not yet close to agreement—in fact, the substantive discussion of the proposal is only beginning.<sup>59"</sup>

## **2.6 OBJECTIVES OF WTO , THE IMPORTANT OBJECTIVES OF WTO ARE:**

1. To improve the standard of living of people in the member countries.
2. To ensure full employment and broad increase in effective demand.
3. To enlarge production and trade of goods.
4. To increase the trade of services.
5. To ensure optimum utilization of world resources.
6. To protect the environment.
7. To accept the concept of sustainable development.

## **2.7 FUNCTIONS AND STRUCTURE OF WTO**

The WTO's overriding objective is to help trade flow smoothly, freely and predictably. It does this by:

- administering trade agreements
- acting as a forum for trade negotiations
- settling trade disputes
- reviewing national trade policies
- building the trade capacity of developing economies

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<sup>58</sup> Supra Note 20

<sup>59"</sup>Members start negotiating proposal on poor countries' food stockholding". WTO official website. 27 March 2013. Retrieved 2 May 2022, Available at [https://www.wto.org/english/news\\_e/news13\\_e/agn\\_27mar13\\_e.htm](https://www.wto.org/english/news_e/news13_e/agn_27mar13_e.htm)

- cooperating with other international organizations

## 2.8 STRUCTURE OF WTO

Decisions are made by the entire membership. This is typically by consensus. A majority vote is also possible but it has never been used in the WTO, and was extremely rare under the WTO's predecessor, the GATT. The WTO's agreements have been ratified in all members' parliaments. The WTO's top level decision-making body is the Ministerial Conference, which meets usually every two years.<sup>60</sup>

The General Council (normally ambassadors and heads of delegation based in Geneva but sometimes officials sent from members' capitals) which meets several times a year in the Geneva headquarters. The General Council also meets as the Trade Policy Review Body and the Dispute Settlement Body. At the next level, the Goods Council, Services Council and Intellectual Property (TRIPS) Council report to the General Council. Numerous specialized committees, working groups and working parties deal with the individual agreements and other areas, such as the environment, development, membership applications and regional trade agreements.<sup>61</sup>

## 2.9 WTO AGREEMENTS

The WTO's rules – the agreements – are the result of negotiations between the members<sup>62</sup>. The current set is largely the outcome of the 1986- 94 Uruguay Round negotiations, which included a major revision of the original General Agreement on Tariffs and Trade (GATT).

The Uruguay Round created new rules for dealing with trade in services and intellectual property and new procedures for dispute settlement. The complete set runs to some 30,000 pages consisting of about 30 agreements and separate commitments (called schedules) made by individual members in specific areas, such as lower tariffs and services market-opening.

Through these agreements, WTO members operate a non-discriminatory trading system that spells out their rights and their obligations. Each member receives guarantees that its exports will be treated fairly and consistently in other members' markets. Each promises to do the same for

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<sup>60</sup> Hashimy and Magoge, *supra* note 3 at 10.

<sup>61</sup> Erskine, Daniel (January 2004). "'Resolving Trade Disputes, the Mechanisms of GATT/WTO Dispute Resolution" by Daniel H. Erskine". *Santa Clara Journal of International Law*. 2 (1): 40.

<sup>62</sup> Understanding the WTO – Intellectual property: protection and enforcement, March 2013 at the Wayback Machine. WTO, Retrieved on 5 March 2022

imports into its own market. The system also gives developing economies some flexibility in implementing their commitments<sup>63</sup>.

### 2.9.1 Goods

It all began with trade in goods. From 1947 to 1994, the GATT was the forum for negotiating lower tariffs and other trade barriers; the text of the GATT spelt out important rules, particularly non-discrimination<sup>64</sup>. Since 1995, the Marrakesh Agreement Establishing the WTO and its annexes (including the updated GATT) has become the WTO's umbrella agreement. It has annexes dealing with specific sectors relating to goods, such as agriculture, and with specific issues such as product standards, subsidies and actions taken against dumping. A recent significant addition was the Trade Facilitation Agreement, which entered into force in 2017.

### 2.9.2 Services

Banks, insurance firms, telecommunications companies, tour operators, hotel chains and transport companies looking to do business abroad enjoy the same principles of more open trade that originally only applied to trade in goods. These principles appear in the General Agreement on Trade in Services (GATS)<sup>65</sup>. WTO members have also made individual commitments under the GATS stating which of their service sectors they are willing to open to foreign competition, and how open those markets are.

### 2.9.3 Intellectual Property

The WTO's Intellectual Property Agreement contains rules for trade in ideas and creativity. The rules state how copyrights, patents, trademarks, geographical names used to identify products, industrial designs and undisclosed information such as trade secrets – “intellectual property” – should be protected when trade is involved. The areas of intellectual property that it covers are: copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical

<sup>63</sup> P. Gallagher, *The First Ten Years of the WTO*, 10

\* Martin-Winters, *The Uruguay Round*, 2

\*Kay, Adrian and Ackrill, Robert (2009) Institutional Change in the International Governance of Agriculture: A Revised Account, *Governance* 22.3: 483–506

**4.0** <sup>64</sup> THE GATT YEARS: FROM HAVANA TO MARRAKESH, AVAILABLE AT  
[HTTPS://WWW.WTO.ORG/ENGLISH/THEWTO\\_E/WHATIS\\_E/TIF\\_E/FACT4\\_E.HTM](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm)

<sup>65</sup> General Agreement on Trade in Services, Available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gatsqa\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm)

indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data.<sup>66</sup>

In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each Member<sup>67</sup>. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO<sup>68</sup>, the Paris Convention for the Protection of Industrial Property (Paris Convention)<sup>69</sup> and the Berne Convention for the Protection of Literary and Artistic Works<sup>70</sup> (Berne Convention)<sup>71</sup> in their most recent versions must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries.

#### 2.9.4 Dispute Settlement

The WTO's procedure for resolving trade conflicts under the Dispute Settlement Understanding is vital for enforcing the rules and therefore for ensuring that trade flows smoothly. Governments bring disputes to the WTO if they think their rights under the WTO agreements are being

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<sup>66</sup> Hashimy and Basavaraju, *supra* note 11 at 45.

<sup>67</sup> TRIPS Agreement Article 2.1 states that “in respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)”.

<sup>68</sup> Convention Establishing the World Intellectual Property Organization Signed at Stockholm on July 14, 1967, and as amended on September 28, 1979, Available at [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_250.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_250.pdf)

<sup>69</sup> Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967, and as amended on September 28, 1979, Available at [https://www.unido.org/sites/default/files/2014-04/Paris\\_Convention\\_0.pdf](https://www.unido.org/sites/default/files/2014-04/Paris_Convention_0.pdf)

<sup>70</sup> Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 (with Protocol regarding developing countries). Done at Stockholm on 14 July 1967, Available at

<https://treaties.un.org/doc/Publication/UNTS/Volume%20828/volume-828-I-11850-English.pdf>

<sup>71</sup> TRIPS Agreement Article 9.1 states that “Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom”

infringed. Judgements by specially appointed independent experts are based on interpretations of the agreements and individual members' commitments. The system encourages members to settle their differences through consultation with each other.<sup>72</sup> If this proves to be unsuccessful, they can follow a stage- by-stage procedure that includes the possibility of a ruling by a panel of experts and the chance to appeal the ruling on legal grounds<sup>73</sup>. Confidence in the system is borne out by the number of cases brought to the WTO – more than 500 cases since the WTO was established compared with the 300 disputes dealt with during the entire life of the GATT (1947-94)<sup>74</sup>.

### 2.9.5 Trade Monitoring

The WTO's Trade Policy Review Mechanism is designed to improve transparency, to create a greater understanding of the trade policies adopted by WTO members and to assess their impact. Many members see the reviews as constructive feedback on their policies. All WTO members must undergo periodic scrutiny, each review containing reports by the member concerned and the WTO Secretariat. In addition, the WTO undertakes regular monitoring of global trade measures. Initially launched in the wake of the financial crisis of 2008, this global trade monitoring exercise has become a regular function of the WTO, with the aim of highlighting WTO members' implementation of both trade- facilitating and trade-restricting measures.

## 3.0 WORLD TRADE ORGANIZATION AND INTELLECTUAL PROPERTY RIGHTS

The WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),<sup>75</sup> negotiated during the 1986-94 Uruguay Round, introduced intellectual property rules into the multilateral trading system for the first time<sup>76</sup>. The Council for Trade in Goods shall oversee the

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<sup>72</sup> Hashimy and Basavaraju, *supra* note 11.

<sup>73</sup> TRIPS Agreement Article 64.1 states that "the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply to consultations and the settlement of disputes under this Agreement except as otherwise specifically provided herein."

<sup>74</sup> The WTO at Twenty: Challenges and achievements, Available at [https://www.wto.org/english/res\\_e/booksp\\_e/wto\\_at\\_twenty\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/wto_at_twenty_e.pdf)

<sup>75</sup> Sayed Qudrat Hashimy, *Protecting Geographical Indications in Afghanistan*, (2022), <https://papers.ssrn.com/abstract=4324242> (last visited Jan 31, 2023).

<sup>76</sup>[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm)

functioning of the Multilateral Trade Agreements.<sup>77</sup> The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services.<sup>78</sup>

The idea of trade, and what makes trade valuable for societies, has evolved beyond simply shipping goods across borders. Innovation, creativity and branding represent a large amount of the value that changes hands in international trade today. How to enhance this value and how to facilitate the flow of knowledge-rich goods and services across borders have become integral considerations in development and trade policy.

The TRIPS Agreement plays a critical role in facilitating trade in knowledge and creativity,<sup>79</sup> in resolving trade disputes over intellectual property, and in assuring WTO members the latitude to achieve their domestic objectives. The Agreement is legal recognition of the significance of links between intellectual property and trade.

"Intellectual property" refers to creations of the mind. These creations can take many different forms, such as artistic expressions, signs, symbols and names used in commerce, designs and inventions. Governments grant creators the right to prevent others from using their inventions, designs or other creations — and to use that right to negotiate payment in return for others using them. These are "intellectual property rights". They take a number of forms. For example, books, paintings and films come under copyright; eligible inventions can be patented; brand names and product logos can be registered as trademarks; and so on. Governments grant creators these rights as an incentive to produce and spread ideas that will benefit society as a whole.

The extent of protection and enforcement of these rights varied widely around the world; and as intellectual property became more important in trade, these differences became a source of

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<sup>77</sup> Hashimy, *supra* note 75.

<sup>78</sup> Agreement establishing the World Trade Organization Article 4.5 states that there shall be a Council for Trade in Goods, a Council for Trade in Services and a Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Council for TRIPS"), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functioning of the Multilateral Trade Agreements in Annex 1A. The Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services (hereinafter referred to as "GATS"). The Council for TRIPS shall oversee the functioning of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "Agreement on TRIPS"). These Councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these Councils shall be open to representatives of all Members. These Councils shall meet as necessary to carry out their functions.

<sup>79</sup> Hashimy, *supra* note 75.

tension in international economic relations. New internationally-agreed trade rules for intellectual property rights were seen as a way to introduce more order and predictability, and to settle disputes more systematically.

The Uruguay Round achieved that The WTO's TRIPS Agreement is an attempt to narrow the gaps in the way these rights are protected and enforced around the world, and to bring them under common international rules. It establishes minimum standards of protection and enforcement that each government has to give to the intellectual property held by nationals of fellow WTO members.<sup>80</sup>

Under the TRIPS Agreement, WTO members have considerable scope to tailor their approaches to IP protection and enforcement in order to suit their needs and achieve public policy goals<sup>81</sup>. The Agreement provides ample room for members to strike a balance between the long term benefits of incentivising innovation and the possible short term costs of limiting access to creations of the mind. Members can reduce short term costs through various mechanisms allowed under TRIPS provisions, such as exclusions or exceptions to intellectual property rights. And, when there are trade disputes over the application of the TRIPS Agreement, the WTO's dispute settlement system is available.<sup>82</sup>

The TRIPS Agreement covers five broad areas:

- how general provisions and basic principles of the multilateral trading system apply to international intellectual property
- what the minimum standards of protection are for intellectual property rights that members should provide
- which procedures members should provide for the enforcement of those rights in their own territories

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**5.0** <sup>80</sup> INTELLECTUAL PROPERTY: PROTECTION AND ENFORCEMENT, AVAILABLE AT

[HTTPS://WWW.WTO.ORG/ENGLISH/THEWTO\\_E/WHATIS\\_E/TIF\\_E/AGRM7\\_E.HTM](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm)

<sup>81</sup> *World Trade Organization, "Part II — Standards concerning the availability, scope and use of Intellectual Property Rights; Sections 5 and 6", Agreement on Trade-Related Aspects of Intellectual Property Rights*

<sup>82</sup> Sayed Qudrat Hashimy, *Protection of Video Games under Indian and the United States of America Copyright Law*, (2022), <https://papers.ssrn.com/abstract=4138875> (last visited Jan 31, 2023).

- how to settle disputes on intellectual property between members of the WTO
- special transitional arrangements for the implementation of TRIPS provisions<sup>83</sup>.

#### **4.0 BASIC PRINCIPLES: NATIONAL TREATMENT, MFN, AND BALANCED PROTECTION**

As in the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), the starting point of the TRIPS Agreement is basic principles. And as in the two other agreements, non-discrimination features prominently: national treatment (treating foreign nationals no less favourably than one's own nationals)<sup>84</sup>, and Most-Favoured-Nation (MFN) treatment<sup>85</sup> (not discriminating among nationals of trading partners). National treatment is also a key principle in other intellectual property agreements outside the WTO.

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<sup>83</sup> *ibid*

<sup>84</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending The Trips Agreement Article 3 states that 1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

2. Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of a Member, only where such exceptions are necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement and where such practices are not applied in a manner which would constitute a disguised restriction on trade.

<sup>85</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending The Trips Agreement Article 4 With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

- (a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
- (b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;
- (c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;

The TRIPS Agreement has an additional important general objective: intellectual property protection should contribute to technical innovation and the transfer of technology. Both producers and users should benefit, and economic and social welfare should be enhanced, the TRIPS Agreement says.

## 5.0 PROTECTION OF INTELLECTUAL PROPERTY

The second part of the TRIPS Agreement looks at different kinds of intellectual property rights and how to protect them. The purpose is to ensure that minimum standards of protection exist in all WTO members.<sup>86</sup> Here the starting point is the obligations of the main international agreements of the World Intellectual Property Organization (WIPO) that already existed before the WTO was created:

- the Paris Convention for the Protection of Industrial Property (patents, industrial designs, etc)
- the Berne Convention for the Protection of Literary and Artistic Works (copyright)<sup>87</sup>.

Some areas are not covered by these agreements. In some cases, the standards of protection prescribed were thought inadequate. So the TRIPS Agreement adds significantly to existing international standards.

Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.<sup>88</sup>

Intellectual property rights refer to the general term for the assignment of property rights through patents, copyrights and trademarks. These property rights allow the holder to exercise a

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(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

<sup>86</sup> Sayed Qudrat Hashimy, *The Doctrine of Copyright Exhaustion in Software under Indian Copyright Act: A Cursory Glance*, 9 (2022), <https://papers.ssrn.com/abstract=4138871> (last visited Jan 31, 2023).

**6.0** <sup>87</sup> FREQUENTLY ASKED QUESTIONS ABOUT TRIPS [ TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS ] IN THE WTO, AVAILABLE AT [HTTPS://WWW.WTO.ORG/ENGLISH/TRATOP\\_E/TRIPS\\_E/TRIPFQ\\_E.HTM](https://WWW.WTO.ORG/ENGLISH/TRATOP_E/TRIPS_E/TRIPFQ_E.HTM)

<sup>88</sup><https://www.wipo.int/about-ip/en/>

monopoly on the use of the item for a specified period. By restricting imitation and duplication, monopoly power is conferred, but the social costs of monopoly power may be offset by the social benefits of higher levels of creative activity encouraged by the monopoly earnings.<sup>89</sup>

IP is protected in law by, for example, patents, copyright and trademarks, which enable people to earn recognition or financial benefit from what they invent or create. By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish.

### 5.1 COPYRIGHT

Copyright usually refers to the rights of authors in their literary and artistic works. In a wider sense, copyright also includes 'related rights': the rights of performers, producers of phonograms and broadcasting organizations.<sup>90</sup>

During the Uruguay Round negotiations, members considered that the standards for copyright protection in the Berne Convention for the Protection of Literary and Artistic Works were largely satisfactory. The TRIPS Agreement provisions on copyright and related rights clarify or add obligations on a number of points:

- The TRIPS Agreement ensures that computer programs will be protected as literary works under the Berne Convention and outlines how databases must be protected under copyright<sup>91</sup>;
- It also expands international copyright rules to cover rental rights<sup>92</sup>. Authors of computer programs and producers of sound recordings must have the right to prohibit

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<sup>89</sup> OECD, Definition of Intellectual Property Rights, Glossary of Statistical Terms, Available at <http://www.oecd.org/dataoecd/8/61/2376087.pdf>

<sup>90</sup> Sayed Qudrat Hashimy, *An Analysis of Naked Licensing in the Case of Trademark Law in the U.S., U.K. And India*, 3 OPEN J. BUS. MANAG. 1, 5 (2022).

<sup>91</sup> Part II – Standards concerning the availability, scope and use of Intellectual Property Rights. Article 9 states that

1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.
2. Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

<sup>92</sup> Part II – Standards concerning the availability, scope and use of Intellectual Property Rights. Article 11 states that In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless

the commercial rental of their works to the public. A similar exclusive right applies to films where commercial rental has led to widespread copying, affecting copyright-owners' potential earnings from their films; and

- It says performers must also have the right to prevent unauthorized recording, reproduction and broadcast of live performances (bootlegging) for no less than 50 years. Producers of sound recordings must have the right to prevent the unauthorized reproduction of recordings for a period of 50 years<sup>93</sup>.

## 5.2 TRADEMARKS

A trademark is a sign or a combination of signs used to distinguish the goods or services of one enterprise from another.<sup>94</sup>

The TRIPS Agreement defines what types of signs must be eligible for protection as trademarks, and what the minimum rights conferred on their owners must be. It says that service marks must be protected in the same way as trademarks used for goods. Marks that have become well-known in a particular country enjoy additional protection<sup>95</sup>.

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such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

<sup>93</sup> Part II – Standards concerning the availability, scope and use of Intellectual Property Rights. Article 12 (Term of Protection) states that Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

<sup>94</sup> Hashimy and Basavaraju, *supra* note 11 at 34.

<sup>95</sup> Part II – Standards concerning the availability, scope and use of Intellectual Property Rights. Article 15 states that 1. Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.

2. Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967).

3. Members may make registrability depend on use. However, actual use of a trademark shall not be a condition for filing an application for registration. An application shall not be refused solely on the ground that intended use has not taken place before the expiry of a period of three years from the date of application.

### 5.3 GEOGRAPHICAL INDICATIONS

A name or indication associated with a place is sometimes used to identify a product. This “geographical indication” does not only say where the product comes from. More importantly, it identifies the product’s special characteristics, which are the result of the product’s origins<sup>96</sup>

Well-known examples include “Champagne”, “Scotch Whiskey”, “Tequila”, “Darjeeling” and “Roquefort” cheese.<sup>97</sup>

Using the indication when the product was made elsewhere or when it does not have the usual characteristics can mislead consumers, and can lead to unfair competition. The TRIPS Agreement says members have to provide ways to prevent such misuse of geographical indications.<sup>98</sup>

For wines and spirits, the TRIPS Agreement provides higher levels of protection, i.e. even where there is no danger of the public being misled<sup>99</sup>. Some exceptions are allowed, for example if the term in question is already protected as a trademark or if it has become a generic term.<sup>100</sup>

The TRIPS Agreement provides for further negotiations in the WTO to establish a multilateral system of notification and registration of geographical indications for wines, which was

4. The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to registration of the trademark.

5. Members shall publish each trademark either before it is registered or promptly after it is registered and shall afford a reasonable opportunity for petitions to cancel the registration. In addition, Members may afford an opportunity for the registration of a trademark to be opposed.

<sup>96</sup> Under Article 62.1 of the TRIPS Agreement members can require compliance with reasonable procedures and formalities as a condition for the acquisition and maintenance of rights to GIs. In practice, as mentioned earlier, members use a variety of different legal means to protect GIs. These include most laws of general application focusing on deceptive or unfair business practices, which are typically available without the need to comply with prior procedures and formalities; whereas others, such as protection under trademark law and under most forms of *sui generis* GI protection, generally require compliance with the formalities and procedures necessary to secure prior recognition of the GI as eligible for protection.

<sup>97</sup> Hashimy, *supra* note 75.

<sup>98</sup> *Id.*

<sup>99</sup> Section 3 of Part II of the TRIPS Agreement entitled ‘Geographical Indications’ Article 23 states that members have to provide interested parties with the legal means to prevent use of a GI identifying wines for wines not originating from the place indicated by the GI or identifying spirits for spirits not originating from the place indicated by the GI. It is made clear that this has to be possible even where: • the true origin of the goods is indicated (i.e. there is not necessarily any confusion on this point); • the GI is used in translation; or • the use of the GI is accompanied by expressions such as: ‘type’, ‘kind’, ‘style’, ‘imitation’, or the like.

<sup>100</sup> Hashimy, *supra* note 75.

subsequently extended to include spirits. The question of whether to negotiate extending this higher level of protection beyond wines and spirits is also being discussed in the WTO.<sup>101</sup>

#### 5.4 INDUSTRIAL DESIGNS

Industrial design is generally understood to refer to the ornamental or aesthetic aspect of an article rather than its technical features.<sup>102</sup>

Under the TRIPS Agreement, original or new industrial designs must be protected for at least 10 years<sup>103</sup>. Owners of protected designs must be able to prevent the manufacture, sale or importation of articles bearing or embodying a design which is a copy or substantially a copy of the protected design for commercial purposes.

#### 5.5 PATENTS

The TRIPS Agreement says patent protection must be available for eligible inventions in all fields of technology that are new, involve an inventive step and can be industrially applied. Eligible inventions include both products and processes.<sup>104</sup> However, governments can refuse to issue a patent for an invention if its sale needs to be prohibited for reasons of public order or morality. They can also exclude diagnostic, therapeutic and surgical methods, plants and animals (other than micro-organisms), and biological processes for their production (other than microbiological processes) from patent protection. Plant varieties, however, must be protectable by patents or by a special system (such as the breeder's rights provided in the conventions of UPOV — the International Union for the Protection of New Varieties of Plants) or by both.<sup>105</sup>

They must be protected for at least 20 years<sup>106</sup>.

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<sup>101</sup> *Id.*

<sup>102</sup> The term 'industrial design' is not defined in the TRIPS Agreement, but is generally understood to refer to the ornamental or aesthetic aspect of an article rather than its technical features. Designs can consist of three-dimensional features, such as the shape of an article, or of two-dimensional features, such as patterns, lines or colours. Industrial designs are present in a wide variety of industrial products including medical instruments, watches, jewellery, electrical appliances and vehicles, Available at

[https://www.wto.org/english/tratop\\_e/trips\\_e/ta\\_docs\\_e/modules6\\_e.pdf](https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules6_e.pdf)

<sup>103</sup> TRIPS Agreement that set out standards for protection of industrial designs (Articles 25 and 26 in Section 4 of Part II of the Agreement) at least ten years of protection must be available for industrial designs, during which owners of protected designs must be able to prevent the manufacture, sale or importation for commercial purposes of articles bearing or embodying a design which is a copy, or essentially a copy, of the protected design. Members must also comply with the relevant provisions of the Paris Convention on industrial designs.

<sup>104</sup> Hashimy, *supra* note 82.

<sup>105</sup> Section 5 of Part II of the TRIPS Agreement entitled 'Patents' Article 27 states:

The TRIPS Agreement describes the minimum rights that a patent owner must enjoy<sup>107</sup>, and defines the conditions under which exceptions to these rights are permitted<sup>108</sup>. The Agreement permits governments to issue “compulsory licences”, which allow a competitor to produce the product or use the process under licence without the owner's consent. But this can only be done under specific conditions set out in the TRIPS Agreement aimed at safeguarding the interests of the patent-holder.<sup>109</sup>

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1. Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Subject to paragraph 4 of Article 65, paragraph 8 of Article 70 and paragraph 3 of this Article, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.
2. Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law.
3. Members may also exclude from patentability:
  - (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
  - (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

<sup>106</sup> Section 5 of Part II of the TRIPS Agreement entitled ‘Patents’ Article 33 states the term of protection available shall not end before the expiration of a period of twenty years counted from the filing date

<sup>107</sup> Section 5 of Part II of the TRIPS Agreement entitled ‘Patents’ Article 28 states that:

1. A patent shall confer on its owner the following exclusive rights:
  - (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product;
  - (b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.
2. Patent owners shall also have the right to assign, or transfer by succession, the patent and to conclude licensing contracts.

<sup>108</sup> Section 5 of Part II of the TRIPS Agreement entitled ‘Patents’ Article 30 mentions that members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

<sup>109</sup> Hashimy, *supra* note 75.

If a patent is issued for a process invention, then the rights must extend to the product directly obtained from the process. Under certain conditions alleged infringers may be ordered by a court to prove that they have not used the patented process.

### **5.6 LAYOUT DESIGNS OF INTEGRATED CIRCUITS**

An integrated circuit is an electronic device that incorporates individual electronic components within a single ‘integrated’ platform configured to perform an electronic function.

The protection of layout designs of integrated circuits (“topographies”) in the TRIPS Agreement is provided through the incorporation of the Washington Treaty on Intellectual Property in Respect of Integrated Circuits, a treaty that was concluded under the World Intellectual Property Organization in 1989, but has not yet entered into force<sup>110</sup>. The TRIPS Agreement adds a number of provisions: for example, protection must be available for at least 10 years<sup>111</sup>.

In practice, layout designs of integrated circuits are commonly protected under patents.

### **5.7 UNDISCLOSED INFORMATION**

Undisclosed information includes trade secrets and test data. Trade secrets must be protected against unauthorized use, including through breach of contract or confidence or other acts contrary to honest commercial practices. Such protection is conditional upon the information

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<sup>110</sup> Section 6 of Part II of the TRIPS Agreement entitled ‘Layout designs of integrated circuits (“topographies”)’ Article 36 highlights that “subject to the provisions of paragraph 1 of Article 37, Members shall consider unlawful the following acts if performed without the authorization of the right holder: <sup>(9)</sup> importing, selling, or otherwise distributing for commercial purposes a protected layout-design, an integrated circuit in which a protected layout-design is incorporated, or an article incorporating such an integrated circuit only in so far as it continues to contain an unlawfully reproduced layout-design”

Article 37.1 states that Notwithstanding Article 36, no Member shall consider unlawful the performance of any of the acts referred to in that Article in respect of an integrated circuit incorporating an unlawfully reproduced layout-design or any article incorporating such an integrated circuit where the person performing or ordering such acts did not know and had no reasonable ground to know, when acquiring the integrated circuit or article incorporating such an integrated circuit, that it incorporated an unlawfully reproduced layout-design. Members shall provide that, after the time that such person has received sufficient notice that the layout-design was unlawfully reproduced, that person may perform any of the acts with respect to the stock on hand or ordered before such time, but shall be liable to pay to the right holder a sum equivalent to a reasonable royalty such as would be payable under a freely negotiated licence in respect of such a layout-design.

<sup>111</sup> Section 6 of Part II of the TRIPS Agreement entitled ‘Layout designs of integrated circuits (“topographies”)’ Article 38.1 states that In Members requiring registration as a condition of protection, the term of protection of layout-designs shall not end before the expiration of a period of 10 years counted from the date of filing an application for registration or from the first commercial exploitation wherever in the world it occurs.

being secret, having commercial value and reasonable steps having been taken by its owner to keep the information secret<sup>112</sup>.

Test data submitted to governments in order to obtain marketing approval for new pharmaceutical or agricultural chemicals must also be protected against unfair commercial use and disclosure. Extended transition periods continue to apply to least developed country members (see section below on transitional arrangements).

### **5.8 ANTI-COMPETITIVE PRACTICES IN LICENSING**

One way for a right holder to commercially exploit his or her intellectual property rights includes issuing a licence to someone else to use the rights. Recognizing the possibility that right holders might include conditions that are anti-competitive, the TRIPS Agreement says that under certain conditions, governments have the right to take action to prevent anti-competitive licensing practices. It also says governments must be prepared to consult each other on controlling anti-competitive licensing practices<sup>113</sup>.

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<sup>112</sup> Section 7 of Part II of the TRIPS Agreement entitled ‘Protection of Undisclosed Information’ Article 39 states:

*1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.*

*2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:*

*(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;*

*(b) has commercial value because it is secret; and*

*(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.*

*3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.*

<sup>113</sup> Section 8 of Part II of the TRIPS Agreement entitled ‘Control of Anti-Competitive Practices in Contractual Licences’ Article 40.3 states that each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or domiciliary of the Member to which the request for consultations has been addressed is undertaking practices in violation of the requesting Member’s laws and regulations on the subject matter of this Section, and which wishes to secure compliance with

More generally, the TRIPS Agreement recognizes that right holders could use their rights to restrict competition or impede technology transfer. The Agreement gives governments the right to take action against anti-competitive practices. In certain situations, the TRIPS Agreement also waives some conditions required for the compulsory licence of a patent in cases where the government grants the compulsory licence in order to remedy a practice determined to be anti-competitive.

### **5.9 2. ENFORCEMENT**

In order for the protection of intellectual property rights to be meaningful, WTO members must give right holders the tools to ensure that their intellectual property rights are respected. Enforcement procedures to do so are covered in part III of the TRIPS Agreement. The Agreement says governments have to ensure that intellectual property rights can be enforced to prevent or deter violations. The procedures must be fair and equitable, and not unnecessarily complicated or costly<sup>114</sup>. They must not entail unreasonable time-limits or unwarranted delays. People involved must be able to ask a court to review an administrative decision or to appeal a lower court's ruling.

The TRIPS Agreement is the only international agreement that describes intellectual property rights enforcement in detail, including rules for obtaining evidence<sup>115</sup>, provisional measures<sup>116</sup>,

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such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall accord full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall cooperate through supply of publicly available non-confidential information of relevance to the matter in question and of other information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.

<sup>114</sup> Section 1 of Part III of the TRIPS Agreement entitled 'Enforcement of Intellectual Property Rights' Article 41.2 states that procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

<sup>115</sup> Section 2 of Part III of the TRIPS Agreement entitled 'Enforcement of Intellectual Property Rights' Article 43 states that :

*1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.*

*2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Member may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint*

injunctions<sup>117</sup>, damages<sup>118</sup> and other penalties. It says courts must have the right, under certain conditions, to order the disposal or destruction of goods infringing intellectual property rights. Wilful trademark counterfeiting or copyright piracy on a commercial scale must be subject to criminal offences. Governments also have to make sure that intellectual property rights owners can receive the assistance of customs authorities to prevent imports of counterfeit and pirated goods.

### **5.10 TRANSITIONAL ARRANGEMENTS: ONE YEAR, 5 YEARS OR MORE**

While the WTO agreements entered into force on 1 January 1995, the TRIPS Agreement allowed WTO members certain transition periods before they were obliged to apply all of its provisions. Developed country members were given one year to ensure that their laws and practices conform

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*or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.*

<sup>116</sup> Section 3 of Part III of the TRIPS Agreement entitled 'Provisional Measures' Article 50, Available at [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_05\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm)

<sup>117</sup> Section 2 of Part III of the TRIPS Agreement entitled 'Enforcement of Intellectual Property Rights' Article 44 (Injunctions) states that :

1. *The judicial authorities shall have the authority to order a party to desist from an infringement, inter alia to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of an intellectual property right.*

2. *Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, Members may limit the remedies available against such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available.*

<sup>118</sup> Section 2 of Part III of the TRIPS Agreement entitled 'Enforcement of Intellectual Property Rights' Article 45 (Damages) states that :

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

to the TRIPS Agreement<sup>119</sup>. Developing country members and (under certain conditions) transition economies were given five years, until 2000. Least-developed countries initially had 11 years, until 2006 — now extended to 1 July 2034 in general.

In November 2015, the TRIPS Council agreed to further extend exemptions on pharmaceutical patent and undisclosed information protection for least-developed countries until 1 January 2033 or until such date when they cease to be a least-developed country member, whichever date is earlier. They are also exempted from the otherwise applicable obligations to accept the filing of patent applications and to grant exclusive marketing rights during the transition period.

### **5.11 TECHNOLOGY TRANSFER**

Developing country members in particular see technology transfer as part of the bargain in which they have agreed to protect intellectual property rights. The TRIPS Agreement aims for the transfer of technology and requires developed country members to provide incentives for their companies to promote the transfer of technology to least-developed countries in order to enable them to create a sound and viable technological base.

### **5.12 INSTITUTIONAL ARRANGEMENTS**

The main forum for work on the TRIPS Agreement is the Council for TRIPS, which was created by the WTO Agreement.<sup>120</sup> The TRIPS Council is responsible for administering the TRIPS Agreement. In particular, it monitors the operation of the Agreement. In its regular sessions, the TRIPS Council mostly serves as a forum for discussion between WTO members on key issues. The TRIPS Council also meets in “special sessions”. These are for negotiations on a multilateral system for notifying and registering geographical indications for wines and spirits.

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<sup>119</sup> Part VI of the TRIPS Agreement entitled ‘Transitional Agreements’ Article 65.1 states that : no Member shall be obliged to apply the provisions of this Agreement before the expiry of a general period of one year following the date of entry into force of the WTO Agreement.

<sup>120</sup> Part VII of the TRIPS Agreement entitled ‘Institutional Agreements’ Article 68 states that The Council for TRIPS shall monitor the operation of this Agreement and, in particular, Members’ compliance with their obligations hereunder, and shall afford Members the opportunity of consulting on matters relating to the trade-related aspects of intellectual property rights. It shall carry out such other responsibilities as assigned to it by the Members, and it shall, in particular, provide any assistance requested by them in the context of dispute settlement procedures. In carrying out its functions, the Council for TRIPS may consult with and seek information from any source it deems appropriate. In consultation with WIPO, the Council shall seek to establish, within one year of its first meeting, appropriate arrangements for cooperation with bodies of that Organization.

### **5.13 COOPERATION WITH OTHER INTERGOVERNMENTAL ORGANIZATIONS**

The preamble to the TRIPS Agreement calls for a mutually supportive relationship between the WTO and WIPO as well as other relevant international organizations<sup>121</sup>. Cooperation between the WTO and WIPO covers notifications of laws, technical assistance and implementing the TRIPS obligations that stem from Article 6 of the Paris Convention for the Protection of Industrial Property.

The WTO also coordinates with a wide range of other international organizations, in particular as regards the organization of symposia, training activities and other events on intellectual property and trade and how these relate to other policy dimensions, such as public health and climate change.

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### **6.0 HISTORICAL BACKGROUND OF WTO, ITS OBJECTIVES AND FUNCTIONS AND RELEVANCY TO AFGHANISTAN**

The legal system of a country will make a critical contribution to providing legal protection for commercial issues in general, and trademark issues in particular. The legal system of Afghanistan, as an Islamic country, has been shaped by a variety of factors stemming from Islamic, social and cultural values. From a judicial perspective, from 1880 to 1964, Afghanistan had a dual judicial system comprising religious or Sharia courts on the one hand, and state or government courts on the other. One of the most important legal issues in this period was the promulgation of the country's first constitution in 1923. One key issue is that this constitution accepted the regulatory role of the state or positive laws on the condition that the positive laws are not contrary to Sharia values<sup>122</sup>.

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<sup>121</sup> TRIPS Agreement Article 69 states that Members agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. For this purpose, they shall establish and notify contact points in their administrations and be ready to exchange information on trade in infringing goods. They shall, in particular, promote the exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods and pirated copyright goods.

**7.0** <sup>122</sup> NADJMA YASSARI, MOHAMMAD HAMID SABOORY, SHARIA AND NATIONAL LAW IN AFGHANISTAN, JURA GENTIUM, RIVISTA DI FILOSOFIA DEL DIRITTO INTERNAZIONALE E DELLA POLITICA GLOBALE, 2010, AVAILABLE AT [HTTPS://WWW.JURAGENTIUM.ORG/TOPICS/ISLAM/EN/YASSARI.HTM](https://www.juragentium.org/topics/islam/en/yassari.htm), ACCESSED ON 19 MAY 2022.

Generally, among the Islamic jurists there are two schools of thought regarding the protection and non-protection of intellectual property rights, with some scholars supporting the notion of protection of IP and others adopting a contrary stance<sup>123</sup>. However, current Islamic jurists encourage modern governments to regulate intellectual property affairs by enacting laws and regulations. Likewise, Afghanistan's legal system has been affected by the civil law legal system. Commercial law in Afghanistan mainly stems from positive law and, to a lesser degree, from customary law. Historically, the legal protection of trademarks in Afghanistan began in 1955 with the enactment of the Afghan Commercial Code (ACOMC). Subsequently, in 1960, a special Trademark Registration Law (TMRL) was approved by the government. Finally, the latest Afghan Trademark Law (ATML) was enacted in 2009. This law defines a trademark as follows: "Trade Marks include (one or more) names, words, signatures, letters, figures, drawings, symbols, titles, seals, pictures, inscriptions, packs or any other mark or a combination thereof",<sup>124</sup>.

To protect a trademark from infringement, and to protect the right of the owner from misuse, virtually all countries provide some administrative and legal authority to provide trademark owners with the necessary legal and administrative protection. In Afghanistan, the Central Business Registration (CBR) office is the core administrative authority for registering and protecting trademarks.

Disputes in commercial issues pertaining to trademarks are resolved in two different ways. On the one hand, there are the formal approaches via interventions by the Commercial Court and other governmental institutions for settling commercial disputes. On the other hand, non-governmental legal entities can handle disputes using an Alternative Dispute Resolution (ADR) approach.

### **6.1 OVERVIEW OF THE AFGHAN LEGAL SYSTEM**

Afghanistan, a civil law legal system<sup>125</sup>, has a mixed legal system. The formation of this legal system dates back to the 19th century. In 1885, Afghanistan's first Code of State Procedure and

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<sup>123</sup> Ibid

<sup>124</sup> -Ministry of Justice, Afghanistan Trademark Law, Official Gazette, (OG) Issue No 995, (2009). [Hereinafter ATML] Art. 4

<sup>125</sup> Almost more than 137 years ago from now (2017), in 1880, the civil law legal system was integrated into the legal system of Afghanistan. To centralize the country and establish a unified government in Afghanistan, it was

Ethics, called *Asas al-quzat* (Fundamental Manual for Judges), and was adopted. The purpose of this Code was to provide a guideline and instruction for judges based on the Hanafi School of Islamic jurisprudence<sup>126</sup>. However, the modernization of Afghanistan's legal system started with the adoption of the 1930 constitution. The constitution was based on Islamic values; however, it also recommended some specific laws and regulations that should be codified. Following the adoption of the 1930 constitution, new laws dealing with "administrative issues of government, as well as criminal, commercial and civil" issues were enacted. During the codification of these laws, Afghanistan drew inspiration from the laws of Turkey, Germany, Switzerland, Egypt and France<sup>127</sup>. Religious values and national traditions "co-exist with positive law"<sup>128</sup>. Therefore, Afghanistan's legal system is referred to as "legal pluralism"<sup>129</sup>. In addition to the formal written or positive laws and Islamic law (Sharia), customary law is another component of the legal system of Afghanistan. The term "legal system" implies "an operating set of legal institutions, procedures and rules"<sup>130</sup>. Legal system can also be termed "legal tradition", which refers to the

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necessary to enact laws and regulations to achieve these objectives. Unfortunately, there are no clear documents to prove the process of how civil law came to be integrated into the legal system of Afghanistan. However, it is known that the centralization and codification process started under Amir Abdur Rahman Khan (1880-1901) and then continued during the leadership of King Amanullah (1919-1929), King Zahir Shah (1930-1973) and President Daud Khan (1973-1978) up until today. See: Nafay Choudhury, Pluralism in Legal Education at the American University of Afghanistan, *Suffolk Transnational Law Review*, Vol. 37:2, (2014) p. 252. Available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2507855](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2507855) (last accessed on January 3, 2017).

<sup>126</sup> -Carol Wang, Rule of Law in Afghanistan: Enabling a Constitutional Framework for Local Accountability *Harvard International Journal*, Vol. 55, (2014), p. 217. [hereinafter Carol Wang, Rule of Law in Afghanistan].

<sup>127</sup> For instance, the family and inheritance issues were inspired by Egypt, and commercial issues drew inspiration from Turkey and France. Abdul Satar Sirat, *The Modern Legal System of Afghanistan An Introduction to the Study of Comparative Law* (1968), *American Journal of Comparative Law*, 563, (1968), p. 106. [hereinafter Abdul Satar Sirat. Modern Legal System of Afghanistan].

<sup>128</sup> Abdul Satar Sirat, *The Modern Legal System of Afghanistan An Introduction to the Study of Comparative Law* (1968), *American Journal of Comparative Law*, 563, (1968), p. 106. [hereinafter Abdul Satar Sirat. Modern Legal System of Afghanistan].

<sup>129</sup> In the context of Afghanistan, "legal pluralism" means that the legal system is composed of three main elements or pillars: customary law, statutory law and Islamic law. Esther Meininghaus, *Legal Pluralism in Afghanistan*, Center for Development Research, University of Bonn, serious 33 (2007), p. 2. [hereinafter Esther Meininghaus, Legal Pluralism in Afghanistan].

<sup>130</sup> USA, State Department, *The Rule of Law in Afghanistan: Legal Traditions and the Afghan Model*, The United States Department of State Bureau of International and Law Enforcement Affairs Office of Afghanistan and Pakistan, (2014), p. 1. [hereinafter The Rule of Law in Afghanistan: Legal Tradition] Available at: [http://touchpointidg.com/wpcontent/uploads/2015/01/2.5-Legal-Traditions-and-the-Afghan-Model\\_FEB\\_2014.pdf](http://touchpointidg.com/wpcontent/uploads/2015/01/2.5-Legal-Traditions-and-the-Afghan-Model_FEB_2014.pdf). (last visited: July 4,2016).

historical nature of law, the rule of law, the function of the legal system and its related organizations<sup>131</sup>.

## 6.2 HISTORICAL DEVELOPMENT OF THE LEGAL SYSTEM OF AFGHANISTAN

The legal history of Afghanistan basically started in 1880 during the reign of King Adur Rahman Khan and has continued until now. He started to centralize the government and to enhance his power and authority over the whole country. Therefore, he initiated the codification of laws and the establishment of a justice system. One of the fundamental achievements in the context of the latter was the creation of *Asas al-quzat*<sup>132</sup>, a judge's manual for harmonizing legal procedures in the justice system. Moreover, the King put Justice Boxes (sanduq-e-adalat) in each district for local residents to deposit their complaints in, which were then transferred to the King's office.<sup>133</sup>

From a justice perspective, from 1880 to 1964, Afghanistan had a dual judicial system comprising both religious (or Sharia) and state (or government) courts. Sharia courts heard criminal, family and personal issues such as inheritance, divorce, endowment and property cases, while the state courts handled commerce, taxation, civil service and other government-related matters.<sup>134</sup>

In 1920, Amir Amanullah Khan intensified the legal reforms and enacted codified laws that were implemented by a centralized government. One of the most important legal issues was the promulgation of the first constitution in 1923 which accepted the regulatory role of the state and positive laws on the condition that the positive laws are not contrary to Sharia values.<sup>135</sup> One of those reforms was the establishment of a court hierarchy. King Amanullah established four kinds

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<sup>131</sup> The Rule of Law in Afghanistan: Legal Traditions . p. 1

<sup>132</sup> -It had 136 provisions for court procedures and decision-making. *Asas al-quzat* was composed of three sections. The first section was about the code of conduct for judges and their behavior towards the parties. The second section concerned the preparation of legal documents, and the final section addressed the duties and authorities of the "market inspector", ormuhtasi. See. Alexander K. Benard, Jason T. Berg, Benjamin G. Joseloff, Anne Stephens and Eli Surgraman, *An Introduction to the Law of Afghanistan*, Stanford Law School, third edition, (2009), p. 6-7. [hereinafter Alexander K. Benard et al, *An Introduction to the Law of Afghanistan*].

<sup>133</sup> - Alexander K. Benard and others, *An Introduction to the Law of Afghanistan*, p. 6-7

<sup>134</sup> P.G. Jangamlung Richard, *Women in Post-Taliban Afghanistan: The Socio-Legal Perspective*, PhD thesis, Jawaharlal Nehru University (2009), p. 66. [hereinafter P. G. Jangamlung Richard, *Women in Post-Taliban*].

<sup>135</sup> Naafy Choudhary, *Reconceptualizing Legal Pluralism in Afghanistan*, Selected Proceedings of the 3rd Annual Canadian Law Student Conference, Windsor Review of Legal and Social Issues in Association with the Windsor Faculty of Law (2010), p. 33. [hereinafter Naafy Choudhary, *Reconceptualizing Legal Pluralism in Afghanistan*]. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1627693](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1627693)

of courts: a pre-judgment court called the Reconciliation Court (mahkama-e-islahaya); the Court of First Instance (mahkama-eibtedaya); the Provincial Court (mahkam-e-murefia); the Court of Cassation (mahkama-e-tamiz). In 1925, as a result of religious and local group demands, the constitution was amended so as to incorporate provisions concerning the role of religion.<sup>136</sup> Therefore, the 1923 constitution recognized two sources of law: Sharia or Islamic law, and state or statutory/positive law. In 1924-25, the codification of a Criminal Code based on Hanafi jurisprudence was one significant reform in the legal system of Afghanistan.<sup>137</sup>

In 1930, Nader Shah took power and enacted a new constitution which was mostly based on Hanafi jurisprudence. According to this constitution, the courts were required to make a decision or resolve the case in accordance with the Hanafi School of thought. The establishment of a legislative body, or National Assembly, was a significant step in the development of the Afghan legal system. The legislative body was composed of two houses, the upper house (majlis-e-aiyan) and the lower house (majlis-e- awam). Members of the upper house were appointed by the King, while the members of the lower house were elected by the people for three year terms. However, it should be noted that the National Assembly had no officially binding legislative power. They could propose law to the King through their endorsement.<sup>138</sup>

In 1933, Zahir Shah (son of Nader Shah) became King of Afghanistan and reigned until 1973. During this period, reform of the legal system continued.<sup>139</sup> For instance, in 1955, in the field of commerce and business law, a first comprehensive Commercial Code was enacted. In 1963 the Law of Commercial Procedure was also enacted. Both of these codes were based on a “European model” with particularly close adherence to the Swiss approach.<sup>140</sup>

In 1964, the new constitution was adopted, establishing a unified and independent judicial system alongside the legislative and executive branches. In 1967, a new law on the Jurisdiction

<sup>136</sup> Alexander K. Benard. et al, *An Introduction to the Law of Afghanistan*, p. 10l.

<sup>137</sup> The United State Department of State Bureau of International and Law Enforcement Affairs Office of Afghanistan and Pakistan, *The Rule of Law in Afghanistan: Chapter 2.5, Legal Traditions and the Afghan Model*, 2014, p. 11. Available at: [http://touchpointidg.com/wp-content/uploads/2015/01/2.5-Legal-Traditions-and-the-Afghan-Model\\_FEB\\_2014.pdf](http://touchpointidg.com/wp-content/uploads/2015/01/2.5-Legal-Traditions-and-the-Afghan-Model_FEB_2014.pdf) [hereinafter USA State Department, *The Rule of Law in Afghanistan*].

<sup>138</sup> Alexander K. Benard and others, *An Introduction to the Law of Afghanistan*, p 11.

<sup>139</sup> USA, State Department, *The Rule of Law in Afghanistan*, p. 11.

<sup>140</sup> Eli Sugarman, Ann Stephens, Raaja Narayan, Max Rettig, *An Introduction to Commercial Law of Afghanistan*, 2nd ed, ALEP, Stanford University (2011), p. 40. [hereinafter Eli Sugarman and others, *An Introduction to Commercial Law of Afghanistan*].

and Organization of the Courts was enacted. This law recognized the four-tier court system comprising Primary Courts, Provincial Courts, Appellate Courts and the Supreme Court. Within these courts there were specialized departments dealing with criminal, civil, personal, commercial and public law.<sup>141</sup> One main attribute of the 1964 constitution was the acceptance of the supremacy of statutory law over the Sharia law (Article 99). According to this supremacy, the courts are required to first define and resolve a case based on the statutory laws. If the statutory law is silent or lacks clear provisions, the court shall refer to Sharia law. Moreover, in this period of time, the court system was united and the previously divided state and Sharia courts merged together to form so-called State Courts<sup>142</sup>.

The successor of Zahir Shah, Mohammad Daoud, took power in 1973. He proclaimed Afghanistan as a republic and abolished the monarchy. Mohammad Daoud continued the legal reforms and adopted a new constitution in 1977. At the same time, 1976 saw the enactment of the first and rather comprehensive Penal Code, still in force today, which followed European principles of criminal law.<sup>143</sup> In 1977, the first Civil Code was enacted and was derived from Sharia law. It is worth mentioning that the Civil Code has remained valid and enforceable up until the present.<sup>144</sup>

In 1978, a new pro-communist regime took power and, in 1980, declared a new provisional constitution. In this era, the role of religion was weakened, and the provisional constitution was the only constitution in the history of Afghanistan that did not recognize Islam as the official religion in the country. The unified court system was maintained and there was no change in the structure of the court system, and the courts continue to apply Sharia law in cases where there were gaps in the law (Article 56). Later on, in 1987 and 1990, the constitution was amended and Islam was again recognized as the official religion of the country.<sup>145</sup> In this period, the “Soviet-

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<sup>141</sup> USA, State Department, The Rule of Law in Afghanistan, p. 12.

<sup>142</sup> Alexander K. Benard et al, An Introduction to the Law of Afghanistan, p. 14.

<sup>143</sup> USA. State Department, The Rule of Law in Afghanistan, p. 13.

<sup>144</sup> Esther Meininghaus, Legal Pluralism in Afghanistan, Center for Development Research, University of Bonn, series 33 (2007), p. 13. [hereinafter Esther Meininghaus, Legal Pluralism in Afghanistan].

<sup>145</sup> Alexander K. Benard and others, An Introduction to the Law of Afghanistan, p. 20.

backed” regime undertook some unsuccessful efforts to introduce and implement a Soviet Union style legal system.<sup>146</sup>

From 1992 up to 2001, the Mujahedin and Taliban regimes came to power, respectively. During the Mujahedin period, a draft constitution was prepared but not implemented as the country was in a state of civil war. In this period, the laws that had been enacted during the Communist regime and which were supposed of being contrary to Islamic values were abolished. The legal system was composed of state and Sharia laws, but the Sharia laws were stronger than statutory law. In 1996, the Taliban took control of the government and established an Islamic Emirate or state under “radical interpretation of Sharia law”.<sup>147</sup> In the Taliban era, “all courts became Sharia courts and applied Sharia laws.” They also repealed most statutory laws and replaced them with Sharia law. Customary law also was banned by the Taliban regime.<sup>148</sup> According to Thomas Barfield, the Taliban used government authority to “impose a rigid legal system with foreign roots that ignored the country’s traditions and values. Taliban imposed strict Salafist interpretation of Islamic law after seizing power”.<sup>149</sup> Therefore, the legal situation from 1992 to 2001 was not stable.

Following the establishment of a new government in 2001, the new constitution of 2004 was adopted. The role of Islam is reflected in Article 1, which states that Afghanistan is an Islamic republic and that Islam is the official religion of Afghanistan. It also guarantees freedom of religion for non-Muslim people. Article 3 of the constitution stipulates that no single law is permitted to contradict Islamic provisions.<sup>150</sup> The 2004 Afghan constitution stipulates three equal branches of government – executive, legislative and the judiciary.<sup>151</sup> In addition, the constitution recognizes the supremacy of Islam.<sup>152</sup> However, Article 130 of the constitution states that the court shall first seek to apply the provisions of the constitution and other related positive laws. If the laws are silent on an issue, the case will be resolved in accordance with Hanafi School

<sup>146</sup> P.G. Jangamlung Richard, Women in Post-Taliban Afghanistan, p. 66.

<sup>147</sup> Alexander K. Benard et al, An Introduction to the Law of Afghanistan, p. 22.

<sup>148</sup> USA, State Department, The Rule of Law in Afghanistan, p. 13.

<sup>149</sup> Esther Meininghaus, Legal Pluralism in Afghanistan, p. 14.

<sup>150</sup> Ministry of Justice, Afghanistan 2004 Constitution, Official Gazette, Issue No. 818 (2004), Art. 1, 2 and 3. [hereinafter Afghanistan 2004 Constitution].

<sup>151</sup> Alexander K. Benard and others, An Introduction to the Law of Afghanistan, p. 25.

<sup>152</sup> Article 3 states that: “In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam”

jurisprudence.<sup>153</sup> Therefore, Sharia legal doctrine plays a “complementary” and secondary role in relation to the statutory laws, and is applicable in cases in which the statutory law is silent or lacks provisions for defining and resolving the issue at hand.<sup>154</sup>

### 6.3 THE STRUCTURE AND SOURCES OF THE LEGAL SYSTEM OF AFGHANISTAN

The Afghan legal system is known as an example for “legal pluralism.” In the context of Afghanistan, legal pluralism implies the “equivalent existence and application of state law, Islamic law and customary law”.<sup>155</sup> Therefore, historically speaking, the legal system of Afghanistan is composed of three main components: 1) state legal codes or statutory laws, 2) Islamic laws or Sharia, and 3) local customary laws. The influence and power of each component depends on the specific subject and the circumstances. As presented in the previous section, in some period’s religion predominated, while in others state laws were prioritized. Likewise, in some places and with regard to some issues, the customary branch has more influence and power than the other sources.<sup>156</sup>

### 6.4 STATE OR STATUTORY LAW

State laws are sets of rules that are passed by the National Assembly, signed by the President and subsequently published in the Official Gazette (OG).<sup>157</sup> The development of statutory law in Afghanistan can be divided into four stages. The first stage is referred to as the “pre-Nizamnama period”, which was before 1919. In this period, there was no difference between statutory regulations and Sharia provisions. One example for this type of statutory law was Asas al-quzat, which was enacted by Amir Abdur Rahman Khan in late 1880.<sup>158</sup> The second phase is termed the “Nizamnama period”, spanning the years from 1919 to 1929 during the reign of King

<sup>153</sup> Article 130 of the Constitution states: “(1) While processing the cases, the courts apply the provisions of this Constitution and other laws. (2) When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible manner.”

<sup>154</sup> Said Mahmoudi, The Sharia in the New Constitution of Afghanistan: Contradiction or Compliment, Max-Planck-Institute für ausländisches öffentliches Recht und Völkerrecht, ZaöRV, 64, (2004), p. 871. [hereinafter Said Mahmoudi, The Sharia in the New Constitution of Afghanistan]. Available at: [http://www.zaoerv.de/64\\_2004/64\\_2004\\_4\\_a\\_867\\_880.pdf](http://www.zaoerv.de/64_2004/64_2004_4_a_867_880.pdf), retrieved on 18<sup>th</sup> June 2022.

<sup>155</sup> Esther Meininghaus, Legal Pluralism in Afghanistan, p. 3.

<sup>156</sup> Thomas Barfield, Culture and Custom in Nation-Building, p. 351.

<sup>157</sup> Alexander K. Benard et al, An Introduction to the Law of Afghanistan, p. 42. Afghanistan 2004 Constitution, Art 94

<sup>158</sup> Mohammad Hashim Kamali, Law in Afghanistan, Leiden E. J. Brill (1985), p. 35. [hereinafter Mohammad Hashim Kamali, Law in Afghanistan].

Amanullah. It began with the enactment of the first Afghan constitution in 1923, called Nizamnama-e-asasi. In terms of hierarchy and authority, the 1923 constitution was inferior to Sharia law. In this phase, there were differences between the statutory laws and Sharia provisions. The third phase is called the “Usulnama period”, which started with the enactment of the 1931 Afghan constitution, termed Usulnama-e-asasi. This period saw the establishment of a legislative body that was authorized to enact laws and regulations in conformity with the Sharia provisions. Finally, the fourth stage is the “Canun period”, or “law period”, which began with the enactment of the 1964 constitution. This Constitution was called Canun-e asasi. This period has continued up until today, and all statutory laws are called Canun.<sup>159</sup> The Canun, or law, is defined in the 2004 Afghan constitution as “what both Houses of the National Assembly approve and the President endorses unless this constitution states otherwise”.<sup>160</sup> These attributes were not foreseen in the Nizamnama and Usulnama periods, in which laws were drafted by a pre-assigned council and endorsed by the King.<sup>161</sup>

State laws and regulations draw their power from the legal authority of government and are applicable throughout the whole country to all people and all cases. The process for enacting statutory law was enhanced after 1978, and at that time the government (albeit unsuccessfully) attempted to remove or at least reduce religious influence in the codification system.<sup>162</sup> In the meantime, various laws and regulations have been enacted in different fields, such as commercial, criminal, family, labour, inheritance, public affairs and civil law, among others.

## 6.5 ISLAMIC OR SHARIA LAW

Besides statutory law, Islamic law constitutes another significant pillar of the Afghan legal system. Since the establishment of Afghanistan in 1747, the state has been ruled under Islamic law. Therefore, Afghanistan’s legal system has been directly affected by Islamic law, which still plays a significant role in the formation and development of the Afghan legal system today. Islamic laws have been integrated as part of the statutory law of the country. Almost all Afghan constitutions have acknowledged and accepted the role of Islamic law.<sup>163</sup> For example, the new 2004 constitution accepts the supremacy of Islamic law in the context of legal codification in

<sup>159</sup> Mohammad Hashim Kamali, *Law in Afghanistan*, p. 36

<sup>160</sup> Afghanistan 2004 Constitution, Art. 94 (1)

<sup>161</sup> Mohammad Hashim Kamali, *Law in Afghanistan*, p. 37.

<sup>162</sup> Thomas Barfield, *Culture and Custom in National Building*, p. 353.

<sup>163</sup> P.G. Jangamlung Richard, *Women in Post-Taliban Afghanistan*, p. 72.

Afghanistan, stating: “in Afghanistan, no law can be contrary to the sacred religion of Islam and the values of this constitution”<sup>164</sup>.

Islamic law, or Sharia, has two kinds of sources – primary and secondary. The primary source of Sharia is the Quran and the Sunnah. They are “everlasting principle, and no derogation from them is permitted.” The Quran is the basic “source of the rules followed by the Sunnah of the Prophet”.<sup>165</sup> Sunnah is a “normative practice or an established course of conduct of the Prophet.” From the scholars’ (ulama) points of view, “Sunnah refers to a source of the Sharia and a legal proof next to the Quran”.<sup>166</sup> In other words, Sunnah is the “statement and deed of Prophet Mohammad”.<sup>167</sup> Sunnah is the second primary source of Sharia and derives its authority from the Quran. It has a complementary role for issues on which the Quran is silent. As the Quran is the primary source of legislation, Sunnah “should not conflict with or change the rules contained in the Quran”.<sup>168</sup>

Islamic law also has secondary sources. Under certain circumstances, if the Quran and Sunnah do not define and/or provide an explicit solution for an issue, it will be resolved or defined by referring to the secondary sources, which are: consensus or Ijma, “unanimous agreement” of Islamic scholars or jurists; Qiyas, “analogical reasoning”<sup>169</sup> Urf, the Islamic customs or traditions; and Maslaha Mursalah, “the public interest”. All of these secondary sources are considered as supplementary sources of rules in Sharia. The rationale behind having these various sources of law is to find the solution to a case in one of them that is in accordance with Islamic rules and provisions.<sup>170</sup> The different sources of Sharia are construed by the Islamic scholars (ulama), who may also act as judges in the state courts.<sup>171</sup> Consequently, Sharia, with

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<sup>164</sup> Afghan 2004 Constitution, Art. 3.

<sup>165</sup> Heba A. Raslan, Shari'a and the Protection of Intellectual Property- the Example of Egypt, IDEA- The Intellectual Property Law Review, Vol.47 (2007), p. 505. [hereinafter Heba A. Raslan, Sharia and the Protection of Intellectual Property]. Available at: <http://www.albalagh.net/qa/copyright.shtml>, Accessed on 15<sup>th</sup> May 2022.

<sup>166</sup> Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, 3rd ed, Islamic Text Society (2003), p. 58- 61. [hereinafter Mohammad Hashim Kamali, Principles of Islamic Jurisprudence].

<sup>167</sup> P.G. Jangamlung, Women in Post-Taliban Afghanistan, p. 73.

<sup>168</sup> Heba A. Raslan, Shari'a and the Protection of Intellectual Property, p. 506

<sup>169</sup> - P.G. Jangamlung, Women in Post-Taliban Afghanistan, p. 73.

<sup>170</sup> Heba A. Raslan, Shari'a and the Protection of Intellectual Property, p. 510.

<sup>171</sup> P.G. Jangamlung, Women in Post-Taliban Afghanistan, p. 73.

different sources of rules, has played a significant role in the formation of the Afghan legal system.

## 6.6 CUSTOMARY LAW, URF

The third source of the Afghan legal system, in addition to positive law and Islamic Sharia, is customary law. Since 1880, efforts have been made to centralise the legal system of Afghanistan, but state laws still provide no response to the current needs in Afghan society. In reality, Afghanistan has never had a comprehensive and powerful state justice system.<sup>172</sup> Therefore, there is enough space for customary law in Afghanistan. There will be instances where the courts find no solution, neither in state nor in Sharia law. In such cases, the court may refer to and rely on customary law, provided the custom and tradition is not in conflict with Islamic values and state law provisions.<sup>173</sup> Particularly, this issue is more applicable for commercial issues. Thus, Sharia recognizes that people have customs and usual habits in their daily lives. Therefore, from an Islamic point of view, customs that do not conflict with the principles of Sharia are “valid and authoritative” and shall be examined and “upheld by a court of law”.<sup>174</sup>

Customary law became widespread and more comprehensive in Afghan society as a result of the non- functioning of government institutions and a lack of rule of law over the past three decades of war in the country. Therefore, almost 80 percent of legal disputes in rural areas are resolved through customary law or informal justice. Since customary law is less expensive, and “faster and more accessible” to the public, the people frequently resort to it.<sup>175</sup> People in rural areas mostly prefer customary law over statutory law. There are three main rationales for resorting to customary law in Afghanistan: first, its concentration is on the substantive aspects of a dispute rather than on procedure. Second, the objective of customary law is “compensation and reconciliation rather than reprimand.” Finally, customary law is based on the unanimous agreement between the parties.<sup>176</sup> Customary law has its base in a “common culture and ethical

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<sup>172</sup> Naafy Choudhary, Reconceptualizing Legal Pluralism in Afghanistan, p. 35.

<sup>173</sup> P.G. Jangamlung, Women in Post-Taliban Afghanistan, p. 75.

<sup>174</sup> Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, p. 370.

<sup>175</sup> P.G. Jangamlung Richard, Women in Post-Taliban Afghanistan, p. 75.

<sup>176</sup> Naafy Choudhary, Reconceptualizing Legal Pluralism in Afghanistan, p. 35

code.” It is an oral tradition that refers to community membership.<sup>177</sup> Customary law, which is based on Jirga or Shura practices, mostly relies on “reconciliation and making peace among disputants.” Therefore, unlike the “state justice system, which creates losers and winners, customary law is based on the community and community elders’ decisions and their objective is to enhance ‘restorative justice’.” Therefore, customary law will return peace and “dignity among” the members of a community.<sup>178</sup>

Though the Afghan constitution of 2004 does not state that customary law is an official source of the Afghan legal system, in practice it is in fact one of its main pillars. For instance, the Afghan Commercial Code (ACOMC) and the Afghan Civil Code (ACC) recognize custom as a viable source for the Afghan legal system.<sup>179</sup> Article 2 of the ACOMC states that commercial disputes will be resolved by referring to a valid and mutual contract. If there is no valid contract, the dispute will be resolved by reference to Afghan commercial laws. According to the ACOMC, commercial customs shall be the next source for resolving commercial disputes. “In the absence of a law, local and special customs (those that are commonly recognized, consented to, and used) are applied”<sup>180</sup> Hence, according to the ACOMC, custom, or Urf, is one of the main sources for commercial dispute resolution. Similarly, Article 2 of the ACC stipulates the hierarchy of sources for a civil dispute as follows: “Where neither provisions of law exist, nor any ruling is found among principles of Hanafi jurisprudence of Islamic Sharia, courts shall decide according to common custom, provided that the custom does not contradict provisions of law or principles

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<sup>177</sup> Thomas Barfield, *Culture and Custom in Nation-Building*, p. 352

<sup>178</sup> Ali Wardak, *State and Non-State Justice Systems in Afghanistan: the Need for Synergy*, Vol. 32, Issue 5, *Journal of International Law* ( 2011), p. 1315. [hereinafter Ali Wardak, *State and Non- State Justice in Afghanistan*]. Available at: <http://scholarship.law.upenn.edu/jil/vol32/iss5/5>

<sup>179</sup> Article 1 and 2 of the Afghan Civil Code addressed the issues as follows: Article 1 states: “(2) In case the law has no provision, the court shall issue a verdict in accordance with the fundamental principles of Hanafi jurisprudence of Islamic Sharia to secure justice in the best possible way.” At the same time Article 2 recognizes the value and role of customs for resolving civil disputes. It states: “Where neither provisions of law exist, nor any ruling is found among principles of Hanafi Jurisprudence of Islamic Sharia, courts shall decide according to common custom, provided that the custom does not contradict provisions of law or principles of justice.” Likewise, Article 2 of the Commercial Code describes the hierarchy of sources of law regarding a commercial dispute: “Commercial disputes shall be settled in accordance with legally binding agreements and, in their absence, by reference to explicit or implicit meaning of commercial laws. If the dispute may not be settled in the said way, commercial customs and practices shall apply. Local and special customs and practices shall be preferred to general customs and practices. In the absence of customs and practices, provisions of other laws to which attribution is made shall apply.” According to this Article, the commercial custom is the third option for resolving commercial disputes.

<sup>180</sup> - Ministry of Justice, *Afghanistan Civil Code, Official Gazette*, Issue No 353, 1975, Article 2. (hereinafter ACC).

of justice".<sup>181</sup> As a consequence, the Urf is considered as a source for commercial and civil issues and the Commercial and Civil Codes have recognized the Urf as a source for commercial dispute resolution.

### **6.7 INTELLECTUAL PROPERTY RIGHTS FROM AN ISLAMIC POINT OF VIEW**

Since intellectual property rights are a new concept within modern positive law, Islamic law makes no clear or particularly precise provision for them. Accordingly, almost all Islamic countries, including Afghanistan, have adopted and applied secular laws to regulate commerce, administration and tax issues.<sup>182</sup> While the Islamic legal system does not expressly provide legal protection for intellectual property rights, one can nonetheless conclude from the main principles and sources of Islamic law that Sharia, in general, does indeed provide support for the protection of intellectual property rights.<sup>183</sup>

At the beginning of this discussion, in order to examine the extent to which Islamic law makes provision for intellectual property rights, it would be useful to shed some light on the sources of Islamic law and their hierarchy. As stated in the previous section, Islamic law has primary sources (Quran and Sunnah) and secondary sources (consensus (Ijma), analogy (Qiyas), custom (Urf) and public interest (Masalaha Mursalah)).

These sources are not examined in detail here, since they are not the primary subject matter of this research. Notwithstanding, understanding the sources of Islamic law overall will help the reader to understand the position of Islamic law on the legal protection of intellectual property rights in particular. In the following, the sources of Islamic law are examined briefly.

### **6.8 PRIMARY SOURCES**

The primary or basic sources of Islamic law or Sharia are the Quran and Sunnah.

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<sup>181</sup> ACC, Art. 2

<sup>182</sup> Heba A. Raslan, *Sharia and The Protection of Intellectual Property*, p. 498.

<sup>183</sup> Amir H. Khoury, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademark*. IDEA, The Journal of Law and Technology, Vol. 43 (2003), p. 202. [hereinafter Amir H. Khoury, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East*].

### 6.8.1 Quran

The Quran is the main source of Islamic law or Sharia.<sup>184</sup> The “Quran is the most authoritative source of Islamic Law”.<sup>185</sup> Indeed, the Quran “is the highest source of Islamic law.” Therefore, “any rule that is traced back to the Quran cannot be contradicted or even modified by rules derived from any other source of Sharia”.<sup>186</sup> Of the 6666<sup>187</sup> verses, 500 relate to legal issues. As a consequence, the Quran is the first and most important source for an Islamic legal system.<sup>188</sup>

### 6.8.2 Sunnah

Sunnah is the second primary source of Islamic Law. Sunnah is a collection of Prophet Mohammad’s sayings, his behaviour or deeds. Sunnah takes its authority directly from the holy Quran. The Sunnah, as a complementary source, sets the rules and principles for those issues on which the Quran is silent.<sup>189</sup> As Sunnah is the second source in the Sharia legislation, it should not be contrary to the Quranic verses, and it has no authority to change the values and rules that have been legislated therein.<sup>190</sup>

### 6.8.3 Secondary Sources

In addition to these primary sources, there are secondary or supplementary sources of Islamic law. The purpose of these supplementary sources is to fill the gaps whenever the two primary sources are silent on an issue. The secondary sources of Islamic law are: consensus (Ijma), analogy (Qiyas), public interest (Maslaha Mursalah) and custom (Urf).

### 6.8.4 Consensus (Ijma)

Ijma has been defined as “the unanimous agreement of the mujtahidun [Islamic scholars] of the Muslim community of any period following the demise of the Prophet Mohammad on any matter”. Ijma has two meanings: the first is “to determine and to agree upon something.” The

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<sup>184</sup> “Sharia represents the body of rules derived from the Quran and the Sunnah and the Ijma, the Qiyas and other supplementary sources”. Heba A. Raslan. Shari'a and the Protection of Intellectual Property, p. 501. See also Amir H. Khoury. Ancient and Islamic Sources of Intellectual Property Protection in the Middle East, p. 202. The terms Islamic law and Sharia are used interchangeably

<sup>185</sup> Javaid Iqbal Kahn, Naveed Ahmad Lone and Fayaz A Sheikh, Intellectual Property Rights in Islam: A Perspective, International Journal of Research in Social Sciences, IJRSS, Vol. 3, Issue 1,(2013), p. 159. [hereinafter Javaid Iqbal et al, Intellectual Property Right in Islam]. Available at:

[https://www.academia.edu/4535433/Intellectual\\_Property\\_Rights\\_in\\_Islam\\_A\\_Perspective?auto=download](https://www.academia.edu/4535433/Intellectual_Property_Rights_in_Islam_A_Perspective?auto=download)

<sup>186</sup> Heba A. Raslan, Shari'a and the Protection of Intellectual Property, p. 506

<sup>187</sup> Among the scholars there is no consensus about the number of verses or ayat in the Quran.

<sup>188</sup> Heba A. Raslan, Shari'a and the Protection of Intellectual Property, p. 506.

<sup>189</sup> Amir H. Khoury, Ancient and Islamic Sources of Intellectual Property Protection in the Middle East, p. 160.

<sup>190</sup> Heba A. Raslan, Shari'a and the Protection of Intellectual Property, p. 506

second meaning is “unanimous agreement on something. Ijma is applicable to all judicial, intellectual, agriculture, commercial, political and administrative issues.<sup>191</sup> Ijma can be traced back to the Quran and Sunnah. In the Ijma, qualified Islamic scholars are allowed to articulate rules for regulating the daily affairs for which the Quran and Sunnah provide no solution.<sup>192</sup>

#### **6.8.5 Analogy (Qiyas)**

Linguistically speaking, Qiyas means “measuring or ascertaining the length, weight or quality of something”. It also means “comparison, with a view to suggesting equality or similarity between two things”.<sup>193</sup> The authority and power of Qiyas is traced back to the Quran and Sunnah sources. The rationale behind accepting a Qiyas is to find a solution for an issue. When a judge is faced with a situation that has not been defined or resolved by the Quran, Sunnah and Ijma – for example the protection of intellectual property rights – analogy or reason is used to resolve the case. In Qiyas, the current and existing rules will be applied to a new situation or case, provided that the new situation is similar to a previous situation.<sup>194</sup>

#### **6.8.6 Public Interest (Masalaha Mursalah)**

Masalaha literally means “benefit” or “interest”. It relates to unlimited public interest and secures an interest or prevents harm to the public. The main objective of Islamic legislation is “to secure the welfare of the people by promoting their benefit or by protecting them against harm”.<sup>195</sup> The rationale for Masalaha is that, when there is a new case or situation that has not previously been addressed in the mentioned sources, such as Quran, Sunnah, Ijma and Qiyas, it is permitted to refer to Masalaha, or public interest, as a “supplementary source of rules in Sharia” to define and settle the issue. According to Islamic scholars, there are five basic purposes of Islamic law or Sharia, which are: “safeguarding and promoting the individual’s faith, life, intellect, posterity and wealth”. Therefore, when a question relates to one of these issues and there is no clear and

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<sup>191</sup> Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, p. 230.

<sup>192</sup> There are three main stipulations for Ijma: 1- the Islamic scholars or Mujtahidun who participate in Ijma must be qualified. 2-“The constituents of Ijma are clear of pernicious innovation and heresy”. 3-“The constituents of Ijma are qualified to carry out ijtehad when the issue requires specialized knowledge in particular areas of Shari’ah”. For more information see: Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, p. 234.

<sup>193</sup> - Hashim Kamali, *Principles of Islamic Jurisprudence*, p. 264.

<sup>194</sup> Heba A. Raslan, *Shari’ah and the Protection of Intellectual Property*, p. 509

<sup>195</sup> Hashim Kamali, *Principles of Islamic Jurisprudence*, p. 351-2

decisive provision to define them in such circumstances, these purposes need to be articulated based on the public interest, unless there is an existing rule.<sup>196</sup>

#### 6.8.7 Customs (Urf)

Islamic law recognizes custom, or Urf, as a source of law. Urf refers to “recurring practices that are acceptable to people of sound nature”. Therefore, a custom must be “sound and reasonable” in order to be valid. An Urf shall be valid and authoritative when it is not in opposition to the basic principles of Sharia.<sup>197</sup> It should be noted that all secondary articulated sources must be in conformity with the Quran and Sunnah values.<sup>198</sup>

It should be noted that Islamic law has yet to directly address the legal protection of intellectual property rights in its jurisprudence. Like with other issues, such as criminal, commercial and administrative law, regulating intellectual property rights is the responsibility of the government. This governmental authority is bestowed by the secondary sources of Islamic law.<sup>199</sup>

However, concerning the legal protection of intellectual property rights, Islamic scholars are divided into those who oppose such protection and those who are in favour of it. The former hold the perception that, in the Sharia, ownership of property is limited to “tangible objects not [...] intangible” objects. They also claim that there is no precedent in the Quran, Sunnah, and Islamic jurist’s points of view that intangible property, such as intellectual property, be regarded as a form of private property and be eligible for selling and purchasing. In addition, according to this notion, knowledge in Sharia does not belong to one person, and no one can prevent others from acquiring it as that would lead to a monopolization of knowledge that Islam does not recognize or approve.<sup>200</sup> Furthermore, there is another perception, namely that “Sharia does not accept IP as it is a tool imposed by the West, which would be no benefit to the Muslim community”. Furthermore, the opponents of intellectual property claim that the primary sources of Sharia (Quran and Sunnah) do not provide for the legal protection of intangible things.<sup>201</sup> They also

<sup>196</sup> Heba A. Raslan, *Shari'a and the Protection of Intellectual Property*, p. 511.

<sup>197</sup> Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, p. 369-70.

<sup>198</sup> Heba A. Raslan, *Shari'a and the Protection of Intellectual Property*, p. 509.

<sup>199</sup> Steven D. Jamar, *The Protection of Intellectual Property Under Islamic Law*, 21 Capital University Law Review, 1079 (1992), p. 1094. [hereinafter Steven D. Jamar, *The Protection of Intellectual Property Under Islamic Law*].

<sup>200</sup> - Heba A. Raslan, *Shari'a and the Protection of Intellectual Property*, p. 502.

<sup>201</sup> Ezieddin Mustafa Elmahjub, *Protection of Intellectual Property in Islamic Shari'a and the Development of the Libyan Intellectual Property System*. PhD thesis. Queensland University of Technology (2014), p. 65. [hereinafter

claim that intellectual property rights are “against Sharia as long as the laws permit the owner to impose restriction on the end user after selling the item containing the intellectual creation”.<sup>202</sup> Likewise, other scholars argue that protecting intellectual property impedes other people from benefiting from knowledge.<sup>203</sup> According to them, this impediment stands in opposition to the Sunnah.<sup>204</sup> Prophet Mohammad said that “the one who conceals knowledge would appear on the day of resurrection as reined in a bridle of fire”. This Hadith is directly related to a rejection of copyright protection.<sup>205</sup> The proponents of protecting intellectual property rights argue that “there is nothing in Sharia that enjoins or contravenes protecting and enforcing intellectual property rights and the Muslims should abide by their contracts and laws applied in their countries”.<sup>206</sup> In addition, there are certain arguments in the Islamic jurisprudence which justify the protection of intellectual property rights. Islamic scholars, by referring to the Islamic sources, recognize intellectual property rights as a concept involving personal rights, money/wealth rights and property rights.

By and large, Sharia acknowledges the right of a person to “accumulate and generate wealth and the right of ownership and possession”. It has been recognized that a person has the right “to reap the fruit of his labour and effort”. Therefore, intellectual property is considered as a legal personal right.<sup>207</sup> Property is sacred under Islamic law. Moreover, Islamic law recognizes private property and ownership. Accordingly, a person who owns intellectual property deserves to collect and receive the benefits from that property. Likewise, Islam has adopted the right of a person to have money and wealth as parts of his property or assets, and people have the right to collect such money and wealth by legal means. Therefore, intellectual property, as a form of wealth, is eligible for protection. Resorting to illegal means for collecting wealth is strongly prohibited in Islam.<sup>208</sup>

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Eziddin Mustafa, Protection of Intellectual Property in Islamic Shari'a]. Available at: [https://www.google.com.af/?gws\\_rd=cr,ssl&ei=hkuSVuj7A4f8swG\\_lbnQAw#q=protection+of+intellectual+property+Its+re+ality+and+Its+Shari%27a+Rule](https://www.google.com.af/?gws_rd=cr,ssl&ei=hkuSVuj7A4f8swG_lbnQAw#q=protection+of+intellectual+property+Its+re+ality+and+Its+Shari%27a+Rule), Accessed on 19<sup>th</sup> June 2022.

<sup>202</sup> Heba A. Raslan, Shari'a and the Protection of Intellectual Property, p. 502.

<sup>203</sup> Hashimy and Magoge, *supra* note 3.

<sup>204</sup> Ezieddin Mustafa Elmahjub, Protection of Intellectual Property in Islamic Shari'a, p. 65

<sup>205</sup> Ibid

<sup>206</sup> Heba A. Raslan, Shari'a and the Protection of Intellectual Property, p. 502.

<sup>207</sup> Amir H. Khoury, Ancient and Islamic Sources of Intellectual Property Protection in the Middle East, p. 164.

<sup>208</sup> Javaid Iqbal and others, Intellectual Property Rights in Islam, p. 160.

Most importantly, intellectual property is considered a type of property. According to Islamic law, all kinds of property originally belonged to God, but have been granted to people. Therefore, the Quran recognizes the rights of private ownership, and trespassing against another's property is thus considered a violation of Sharia.<sup>209</sup>

It is noteworthy that two main religious opinions, or Fatwa, concerning the protection of intellectual property rights have recently come from the Council of the Islamic Fiqh Academy<sup>210</sup> and the Fatwa Committee of Al-Azhar University.<sup>211</sup> The Council of the Islamic Fiqh Academy, regarding the protection of intellectual property, issued the following opinion (Fatwa), which is an important source for the modern governments to issue statutory laws and regulations for protection of intellectual property rights and trademarks. The Fatwa states: "Business name, corporate name, trade mark, literary production, invention or discovery, are rights belonging to their holders and have, in contemporary times, financial value which can be traded. These rights are recognized by Sharia and should not be infringed". The Fatwa also recognizes intellectual property rights as financial rights: "It is permitted to sell a business name, trade mark for a price in the absence of any fraud, swindling or forgery, since it has become a financial right". Regarding copyrights and patents and their owners, the Council of Islamic Fiqh states the following: "Copyrights and patent rights are protected by Sharia. Their holders are entitled to freely dispose of them. These rights should not be violated".<sup>212</sup> This Fatwa shows that Islamic law indeed recognizes and seeks to protect all forms of rights pertaining to intellectual property.

At the same time, the Fatwa Committee of Al-Azhar University issued an opinion in 2000 and 2001, which states that "Islam gives the owner the freedom to dispense of the property owned thereby as he wishes; no other person may dispose of, copy, enjoy, use or attribute such property thereto without the prior consent of the owner, whether for compensation or not".<sup>213</sup> This Fatwa shows that intellectual property is considered property, and that its owner has sole authority and

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<sup>209</sup> Amir H. Khoury. Ancient and Islamic Sources of Intellectual Property Protection in the Middle East, p. 166, Arabic link: <http://www.iifa-aifi.org/>

<sup>211</sup> Fatwa Committee of Al-Azhar University, Available at <http://www.islamopediaonline.org/websites-institutions/al-azhar-university-fatwa-committee-cairo-egypt>, Accessed on 14<sup>th</sup> April 2022.

<sup>212</sup> Islamic Fiqh Academy. Resolutions and Recommendations of the Council of the Islamic Fiqh Academy 1985-2000, First edition, 2000, p. 89. Available at: <https://uaelaws.files.wordpress.com/2012/05/resolutions-and-recommendations-of-the-council-of-the-islamic-fiqh-academy.pdf>

<sup>213</sup> Heba A. Raslan. Shari'a and the Protection of Intellectual Property, p. 503

rights to benefit from it. One important issue should be noted. According to Islamic principles, intellectual property rights, as part of property, do not relate to or depend on “the entity of the owner or his religious beliefs”. Consequently, the property rights equally apply to Muslim and non-Muslim owners of property.<sup>214</sup>

In fact, while Sharia does not explicitly and clearly recognize and protect intellectual property rights, referring to different sources of Islamic law reveals that the notion of protecting intellectual property has been acknowledged by Islamic scholars. In reality, there are no explicit provisions in the main sources of Sharia that limit the ownership of property to tangible assets. Therefore, in Sharia, the word “property” has a broader meaning encompassing both tangible and intangible objects. Moreover, different sources of Sharia law (Sunnah, Ijma, Qiyas, Maslahah, and Urf) authorise the state to enact laws and regulations for the protection of property in general, and intellectual property in particular.<sup>215</sup>

Since Afghanistan is one of the LDCs currently, the accession to WTO gives responsibilities and commitment to abide by the terms and conditions such as domestic reforms for transformation to a productive market economy, attracting investments and creating jobs and improving the welfare of Afghans<sup>216</sup>. For the development of the economy, compliance with WTO is to be adhered by Afghanistan which obliges the country to make trade policies transparent by notifying the WTO about laws in force and measures adopted. Since Afghanistan has gained accession to WTO recently, WTO agreements should be properly implemented. Since the political instability of Afghanistan has hindered growth in trade and economy, it is important to study its impact on Afghanistan. With respect to Intellectual property, there are no statutory laws which regulate issues related to IPR.

The researcher understood the importance of ministerial conferences along with provisions relating to Intellectual Property Rights and Trade. Non-discriminatory and most-favoured nation

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<sup>214</sup> Amir H. Khoury, *Ancient and Islamic Sources of Intellectual Property Protection in the Middle East*, p. 166.

<sup>215</sup> Bashar H. Malkwai, *Intellectual Property Protection from a Shari'a Perspective*, *Southern Cross University Law Review*, Vol. 16 (2013), p. 94. [hereinafter Bashar H. Malkwai, *Intellectual Property Protection from Sharia Prospective*].

<sup>216</sup> WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) Article XI (2) of the Agreement states that “the least-developed countries recognized as such by the United Nations will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs or their administrative and institutional capabilities”.

treatment under the WTO provides equality of all member nations. WTO is the most important international organization that governs world trade. This chapter also studied the TRIPS Agreement which is a minimum standards agreement allowing Members to provide more extensive protection of intellectual property if they so wish. Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice. The main objective of WTO and TRIPS was to reduce distortions and impediments to international trade, promoting effective and adequate protection of IPRs, and ensuring that measures and procedures to enforce IPRs do not themselves become barriers to legitimate trade. The role of WTO in the protection of trade and IPR in Afghanistan was studied in chapter III.

## 7.0 CONCLUSION

The WTO agreement has considerably affected on import, export, market and economy and TRIPS agreement has impact on the copy rights, trademark, patent, Industrial design, utility model, integrated circuits and geographical indication. However, the scheme of present study confined to assess the impact of WTO agreement and TRIPS agreement in Afghanistan. To provide evidence that main purpose of WTO which is resolving disputes, equal treatment, free trade and transit dispute settlement is fulfilled. In order to get the membership in the WTO, Afghanistan brought in some internal reforms related to trade, economy, and investment. Making these changes in the country paves a path for trade activities. Also, the study will identify the loopholes that hinder the progress of trade and protection of IPR in Afghanistan.

The scope of research cannot be made wider by comparing the impact in the pre and post implementation of the agreement. Also, lack of available and reliable previous research studies with respect to Afghanistan makes it difficult to integrate information and draw an interpretation about the impact of WTO on trade and IPR. Time constraint is also one of the main limitations of the research. Better results can be obtained if sufficient time is invested in conducting the research. The outcome of the present study will be beneficial to the National Assembly of Afghanistan to enact new or reform the existing law dealing with the issue International trade and Intellectual Property Rights protections ; to executive authorities to implement the statutory law with regard to protection of Intellectual Property laws in effective way; to the judiciary to follow a consistent approach in dealing with cases relating commercial disputes of Intellectual

Property rights protections in Afghanistan. Besides, this research work will be highly useful particularly to Chamber of Commerce, Department of Intellectual Property, Ministry of Commerce and Industry of Afghanistan and generally for academicians, students, lawyers, judges, NGOs, and general members of the public.